No. 97-42-CFX Title: Eastern Enterprises, Petitioner
v.
Kenneth S. Apfel, Commissioner of Social Security, et al.

Docketed:
July 3, 1997 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Jul 2 1997	Petition for writ of certiorari filed. (Response due September 3, 1997)
	Jul 31 1997	Order extending time to file response to petition until September 3, 1997.
	Jul 31 1997	This extensionis granted for all respondents.
	Aug 29 1997	Brief of respondent Shirley Chater, Commissioner of Social Security in opposition filed.
	Sep 3 1997	Brief of respondent UMWA Combined Benefit Fund and its Trustees in opposition filed.
	Sep 3 1997	LODGING consisting of one copy of "Coal Commission Report" submitted by counsel for the respondents
	Sep 3 1997	Brief of respondents Peabody Holding Company, Inc., et al. in opposition filed.
	Sep 15 1997	Reply brief of petitioner Eastern Enterprises filed.
	Sep 17 1997	DISTRIBUTED. October 10, 1997
	Oct 14 1997	REDISTRIBUTED. October 17, 1997
	Oct 20 1997	Petition GRANTED. SET FOR ARGUMENT March 4, 1998. **********
	Nov 7 1997	Order extending time to file brief of petitioner on the merits and the joint appendix to and including Thursday, December 11, 1997. Order extending time to file respondent's brief to and including Tuesday, January 20, 1998. These extensions of time are conditioned upon receipt by the Clerk of the documents on the due date. Rule 29.2 does not apply.
	Dec 11 1997	Joint appendix filed.
	Dec 11 1997	* Joint appendix in two volumes.
	Dec 11 1997	Brief of petitioner Eastern Enterprises filed.
	Dec 11 1997	Brief amicus curiae of Washington Legal Foundation filed.
	Dec 11 1997	Brief amicus curiae of Pittston Company filed.
	Dec 11 1997	Brief amici curiae of AlliedSignal Inc., LTV Corp., and Bellaire Corporation filed.
	Dec 11 1997	Brief amici curiae of Unity Real Estate Company, et al. filed.
	Dec 11 1997	LODGING consisting of two sets of four volumes of the lower court joint appendix received from counsel for the petitioner.
	Dec 11 1997	Brief amici curiae of Pardee & Curtin Lumber Company and the Hillman Company filed.
	Dec 16 1997	Motion of Davon Inc. for leave to file a brief as amicus curiae filed.
	Dec 22 1997	CIRCULATED.
	Jan 12 1998	Motion of Davon Inc. for leave to file a brief as amicus curiae GRANTED.

No. 97-42-CFX

Entry	Date	Proceedings and Orders
	Jan 15 1998	Record filed.
	Jan 20 1998	Brief of respondent Kenneth Apfel, Commissioner of Social Security filed.
	Jan 20 1998	Brief of respondents UMWA Combined Benefit Fund and Its Trustees filed.
	Jan 20 1998	LODGING consisting of three annual reports for Eastern Gas and Fuel Associates for the years 1970, 1974, and 1980 submitted by counsel for resondents UMWA.
	Jan 20 1998	Brief of respondents Peabody Holding Company,Inc. et al. filed.
	Jan 20 1998	Brief amici curiae of California Cities and Counties, et al. filed.
	Jan 20 1998	Brief amicus curiae of Midwest Motor Express, Inc. filed.
	Jan 20 1998	Brief amici curiae of Ohio Valley Coal Company and Maple Creek Mining, Inc. filed.
	Jan 20 1998	Brief amicus curiae of United Mine Workers of America filed.
	Jan 20 1998	Brief amicus curiae of Bituminous Coal Operators' Association filed.
	Jan 20 1998	Brief amici curiae of Cedar Coal Company, et al. filed.
	Jan 20 1998	Brief amicus curiae of Freeman United Coal Mining Company filed.
	Feb 3 1998	Application (A97-568) to file a reply brief in excess of the page limits, submitted to Justice Souter.
	Feb 4 1998	Application (A97-568) denied by Justice Souter.
	Feb 4 1998	Motion of Solicitor General for divided argument filed.
	Feb 5 1998	Record filed.
	Feb 17 1998	Reply brief of petitioner Eastern Enterprises filed.
	Feb 23 1998	Motion of Solicitor General for divided argument GRANTED.

(1) 97-42 JUL 2 1997

No. -OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

EASTERN ENTERPRISES,
PETITIONER,

v.

SHIRLEY S. CHATER,
COMM'R OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN T. MONTGOMERY
Counsel of Record
ROBERT DANIEL O'CONNOR
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Does retroactive liability for retiree health benefits under the Coal Act violate the Due Process Clause, considering the question left open in *Usery v. Turner Elkhorn,* where Eastern's participation in the coal industry from 1947 to 1965 did not contribute to the financial crisis that prompted Congress to enact the statute in 1992?

2. Does the Coal Act violate the Takings Clause by upsetting Eastern's investment-backed expectations and by imposing a liability out of all proportion to Eastern's "experience" between 1947 and 1965 with retiree benefit plans for coal miners?

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust, that it has no parent company, and that its only non-wholly owned subsidiary is *All*Energy Marketing Company, L.L.C., in which Eastern owns a fifty percent interest through a joint venture with New England Electric System.

LIST OF PARTIES

The plaintiff to the proceedings below was the petitioner Eastern Enterprises. The defendants to the proceedings below were the respondents Shirley S. Chater in her capacity as Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The third-party defendants to the action below were the respondents Peabody Holding Co., Inc., Coal Properties Corp., and Eastern Associated Coal Corp.

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The petitioner Eastern Enterprises respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on April 7, 1997.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 110 F.3d 150 (1st Cir. 1997), and is reprinted in the Appendix hereto, p. A-1, *infra*.

The Judgment and Order of United States District Court for the District of Massachusetts (Wolf, D.J.) have not been reported and are reprinted in the Appendix hereto, p. A-24 and A-25, *infra*, respectively. The Memorandum and Order of United States District Court for the District of Massachusetts (Wolf, D.J.) is reported at 942 F. Supp. 684 (D. Mass. 1996), and is reprinted in the Appendix hereto, p. A-28, *infra*.

Jurisdiction

The judgment for the United States Court of Appeals of the First Circuit was entered on April 7, 1997. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and selective portions are reproduced in the Appendix hereto, A-39.

Statement of the Case

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("Coal Act") as applied to Eastern Enterprises ("Eastern"). Under the Coal Act, Eastern has been assigned responsibility to pay premiums for lifetime health benefits for more than 1,400 former employees (or their dependents), all of whom worked for Eastern before 1966. As a result, Eastern faces a liability actuarially projected to be more than $100 million. *See* JA 145.[1]

On November 1, 1993, Petitioner Eastern filed suit against the Respondents Social Security Administration ("SSA"), the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), and the Combined Fund's trustees, claiming that the Coal Act, as applied to Eastern, violates substantive due process and constitutes an uncompensated taking of Eastern's property (the "Constitutional Claims"), both in violation of the Fifth Amendment.[2] As explained below, the district court and the

[1] The joint record appendix from the United States Court of Appeals for the First Circuit is referred to as "JA."

[2] Eastern also amended its complaint to contend that the beneficiaries assigned to Eastern by SSA should have been assigned to the successor to Eastern's coal business, Eastern Associated Coal Corp. ("EACC"). Eastern also filed a third-party complaint against EACC and its controlling shareholders, Peabody Holding Co., Inc. and Coal Properties Corp., for indemnification for any liability Eastern may have under the Coal Act.

court of appeals each upheld the application of the statute to Eastern.

Set forth below are the relevant facts regarding the history of the United Mine Workers of America's ("UMWA") various coal industry retiree health benefit plans, the development and operation of the Coal Act, and Eastern's relationship to both.

A. *The UMWA Funds*

In 1946, following a strike in the coal industry, President Truman issued an Executive Order directing the Secretary of the Interior to take possession of the coal mines and to negotiate appropriate changes in the terms and conditions of employment with the UMWA. The Secretary and the UMWA created a multiemployer welfare and retirement fund to provide miners with health benefits to be funded through payroll deductions. In 1947, following the return of control of the mines to the mine operators, the UMWA and the Bituminous Coal Operators Association ("BCOA") negotiated the first National Bituminous Coal Wage Agreement ("NBCWA"). The 1947 NBCWA created a new multiemployer union welfare trust, the W&R Fund, to which signatory employers were required to pay a royalty for every ton of coal produced or sold. The 1947 NBCWA did not require the W&R Fund to pay any specific benefits to miners; it merely authorized the fund trustees to determine the benefits to be provided. The W&R Fund was managed on a "pay as you go basis" under which benefits were

provided directly from tonnage royalty payments.[3] *See* JA 126-27.

In 1950, a new multiemployer fund was established, the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). From 1950 to 1974, the terms and structure of the 1950 W&R Fund remained essentially unchanged. Coal operators made set contributions to the Fund only during the effective period of the NBCWA they signed; they were not required to provide, let alone guarantee, any benefit levels. Indeed, beneficiaries of the plan were specifically told that benefits were revocable and not vested, *see* JA 129-130, and the Fund trustees frequently exercised their authority to revise eligibility requirements for benefits and to alter, rescind, or reduce particular benefits, *see* JA 128-132.

In 1974, in response to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, the BCOA and the UMWA entered into a new NBCWA that differed substantially from previous agreements. The 1974 NBCWA created four new trusts as successors to the 1950 W&R Fund, two of which were benefit plans: the 1950 Benefit Plan, which provided health benefits for pre-1976 retirees, and the 1974 Benefit Plan, which provided health benefits to miners who retired in 1976 or thereafter (the "1974 Benefit Plan"). Most important, under the 1974 NBCWA, the Fund was required for the first time to provide certain lifetime health benefits to miners. *See* JA 133-34.

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[3] The operator-appointed trustee unsuccessfully challenged the UMWA-selected "pay as you go" methodology for the original fund on the grounds that such a system was inherently flawed and prone to financial difficulties. *See Van Horn* v. *Lewis*, 79 F. Supp. 541 (D.D.C. 1948).

In 1978, the BCOA and the UMWA entered into another new NBCWA designed to restructure the industry's health care system. The financial stability of the Funds had begun to deteriorate in the late 1970s, due principally to the withdrawal of large numbers of employers from participation in the NBCWAs; many left the coal business and others signed non-UMWA agreements. *See* JA 137-138; Staff of House Comm. on Ways & Means, 104th Cong., 1st Sess., Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992, at 67 (Comm. Print) ("1995 W&M Report"). As a result, the 1978 NBCWA was the first to contain the "guarantee clause," which essentially obligated signatory operators to make higher contributions to the Funds if and when necessary to guarantee sufficient funding for medical costs. The 1978 NBCWA continued the multiemployer approach for those retiring before 1976, but it provided that persons retiring on or after January 1, 1976, would receive their health benefits from single-employer plans maintained by the retirees' last NBCWA signatory employer. *See* JA 136-137. Subsequent NBCWAs signed in 1981, 1984, and 1988 also explicitly guaranteed lifetime health benefits to all coal industry retirees. *See id.*

B. *Eastern Enterprises*

Eastern (known before 1989 as "Eastern Gas and Fuel Associates") was created in 1929 as a Massachusetts business trust. From 1946 to 1965, Eastern was involved in the coal business through its Coal Division, which operated a number of mines primarily in Pennsylvania and West Virginia. During that time, Eastern employed miners associated with the UMWA and signed NBCWAs that required Eastern to contribute to the 1950 W&R Fund. Eastern made all mandated contributions under those NBCWAs, which the Combined Fund concedes exceeded $60

million, and otherwise satisfied all of its contractual obligations to the Fund and to its employees. *See* JA 2626.

In 1963, Eastern transferred all of its coal-related operations to its newly created subsidiary, EACC. As a Massachusetts business trust, Eastern knew that its shareholders could be liable for unsatisfied debts of the trust. In order to attract capital, it was necessary therefore that Eastern confine operational liabilities to its subsidiaries. *See* JA 214-15. Eastern had transferred all of its coal-related assets to EACC by the end of 1965, and Eastern's Coal Division then ceased to exist. All coal-related liabilities, known and unknown, became the responsibility of EACC. *See* JA 201, 203, 209, 214, 263.[4]

Following completion of the transfer, EACC repeatedly represented to the world, in filings with the Securities and Exchange Commission and in other contexts, that it was the "successor" to Eastern's Coal Division. *See* JA 264, 265, 277-78, 338-572. EACC's conduct mirrored those representations. EACC was operated by the management of the former Coal Division, and continued to operate the same mines, and to employ the same miners as had the Coal Division. Moreover, EACC took over Eastern's contracts with the UMWA, and replaced Eastern as a member of the BCOA, the organization that negotiated with the UMWA, *see* JA 211-12. Beginning in 1966, EACC, not Eastern, proceeded to negotiate and to sign the various

[4] Neither SSA nor the Combined Fund submitted affidavits or sought discovery concerning EACC's succession to Eastern's coal-related assets and liabilities. *Compare* JA 115-23 *with* JA 1879-82, 2329. While Peabody did attempt to contest certain facts related to that issue, *see* JA 2106-20, neither court below addressed these apparent factual disputes, nor did either decide whether Peabody has standing to raise them in this action.

NBCWAs, including the 1974 and subsequent agreements that guaranteed lifetime benefits to all eligible miners and dependents (including former employees of Eastern).

In 1987, Eastern sold EACC to Peabody Holding Co. Because of the structure of the transaction (in which Peabody purchased all of the stock of EACC's sole shareholder), all of EACC's liabilities (including any assumed from Eastern in 1966) remained with EACC. *See* JA 216-17. The price Eastern received for EACC took into account the fact that all coal-related liabilities (known and unknown) would remain with EACC. *See id.*

C. *The Coal Act*

During the 1980s, the problems that had led to the 1978 restructuring of the UMWA multiemployer health care system became more acute and threatened the 1950 and 1974 Benefit Plans' ability to continue providing health benefits to their beneficiaries. *See* 1995 W&M Report, *supra*, at 67. A significant number of signatory operators either left the coal business entirely or shifted to non-UMWA miners and then ceased to pay premiums to the UMWA benefit plans (the so-called "dumping" or "abandoning" of retirees). As late as 1981, the BCOA had 130 member companies, but by 1984 the number had dropped to 30, and by 1992 it had dropped to 15. The UMWA plans were forced to provide benefits for a growing number of retirees from a shrinking premium base. As the Funds approached insolvency, the remaining signatory operators and the UMWA sought congressional intervention. *See* JA 1479-81.

In 1990, Secretary of Labor Elizabeth Dole established a special commission, the Advisory Commission on Mine Workers Retiree Health Benefits (the "Coal

Commission"), to study the retiree health benefit crisis. The Coal Commission identified three developments which, in combination, had left the Funds in a financial crisis. *See* JA 1333. First, the Coal Commission found that the number of coal companies making contributions to the Funds had declined significantly. Second, it recognized an increase in the cost of health care between 1950 and 1990. Finally, it noted the increase in the number of orphaned retirees whose employers had either gone out of business or no longer provided health care benefits. The Coal Commission proposed two alternative funding solutions: an industry-wide funding plan taxing all current coal operators and a more limited arrangement funded by present and former NBCWA signatories, but only reaching as far back as signatories to the 1978 NBCWA which first guaranteed lifetime benefits. *See* JA 139-140.

In light of the Commission's recommendations, Congress considered a series of solutions designed to ensure that the promises of health benefits to current retirees under the 1978 and later NBCWAs would be honored. None of these solutions, however, mandated contributions by pre-1978 NBCWA signatories. *See* JA 140. It was only as a result of a Senate floor amendment to one such proposal, added without any hearing or debate, that Congress extended Coal Act liability to every coal operator that had ever signed *any* NBCWA. *See* JA 1774. The Coal Act codifies lifetime benefits promised in the 1988 NBCWA. *See* 1995 W&M Report, *supra*, at 114. The Combined Fund was created by the statutory merger of the 1950 and 1974 Benefit Plans to provide health benefits to beneficiaries who were receiving benefits from those Plans as of July 20, 1992. *See* 26 U.S.C. §§ 9702(a), 9703(f).

To finance the Combined Fund, the Coal Act requires the assignment of the Fund's beneficiaries to companies that are "in business, . . . whether or not in the coal industry." *Id.* § 9701(c)(7). The Coal Act assignments are based on a three-tiered hierarchy. A beneficiary is to be assigned, first, to the signatory operator that both signed the 1978 NBCWA and most recently employed the beneficiary for two years. If no such entity remains in business, the beneficiary is assigned to the signatory operator that both signed the 1978 NBCWA and most recently employed the beneficiary for any length of time. Finally, if no entity remains in business that meets either description, the beneficiary is assigned to the signatory operator that employed the beneficiary "for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." *Id.* § 9706(a). Combined Fund beneficiaries for whom no assignment can be made under this hierarchy are deemed to be unassigned beneficiaries. Once the assignments are made, the Coal Act assesses each signatory operator annual health benefit and death benefit premiums based on the number of former employees (and their dependents and survivors) assigned to it, and assesses an additional annual premium equal to each operator's pro rata share of unassigned beneficiaries. *See id.* § 9704(a)-(d).

D. *The District Court Judgments*

Petitioner commenced this action seeking a judgment declaring the Coal Act unconstitutional as applied and later added a count challenging SSA's statutory interpretation of the Coal Act. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). On February 1, 1996, the District Court denied Eastern's motion for summary judgment on its Statutory Claim and filed a Memorandum and Order on March 30, 1996. *See* A-28. The District

Court, by Order dated June 29, 1996, also denied Eastern's motion for summary judgment and allowed defendants' cross-motions on the Constitutional Claims, stating that it found persuasive the reasoning of several Circuit Courts that had addressed the constitutionality of the Coal Act. *See* A-26. The District Court then entered an Amended Judgment in favor of defendants on both the Statutory and Constitutional Claims on July 24, 1996. *See* A-25.

E. *The Court of Appeals Decision*

The United States Court of Appeals for the First Circuit affirmed the District Court's findings. The Court of Appeals first addressed petitioner's substantive due process challenge. The court held that Congress' purpose in enacting the Coal Act—to ensure that multiemployer coal retiree benefit plans were adequately funded—was legitimate. Denying Eastern's substantive due process challenge, the court concluded that because Eastern had contributed implicitly to miners' expectations of lifetime health benefits, Congress had acted rationally in requiring Eastern to pay for those benefits. The court failed to consider, however, the lack of any connection between Eastern's conduct and the financial crisis that caused Congress to enact the Coal Act's sweeping retroactive liability scheme.

The First Circuit then turned to Eastern's Takings Clause challenge. Noting that "it would be surprising" to discover a taking violation where no due process violation exists, the court conducted a brief, ad hoc inquiry into the nature of the economic deprivation at issue and found that Eastern had not suffered a compensable taking in violation of the Fifth Amendment. This conclusion was reached without regard to the absence of any contribution by Eastern to the financial shortfall that prompted Congress to enact the Coal

Act, or the upset to Eastern's expectations resulting from a liability imposed a generation after Eastern left the coal business.

F. *Other Coal Act Decisions*

Several other courts of appeal have considered whether the Coal Act violates the Due Process and Takings Clauses, three of which have led to petitions for writs of certiorari that his Court has denied. *See Blue Diamond Coal Co.* v. *Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 520 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1119-20 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 484 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995). None of the petitions for writs of certiorari to any of the other courts of appeal, however, have involved a situation similar to Eastern's. In each of these other cases, the companies challenging the Coal Act left the coal industry without making any provision for continued contributions to the UMWA Benefit Funds. *See Blue Diamond*, 79 F.3d at 520; *Davon*, 75 F.3d at 1119-20; *LTV*, 53 F.3d at 484. The companies thus orphaned their retirees and directly contributed to the funding crisis that necessitated the Coal Act. *See also Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996).

Reasons for Granting the Writ

I. THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO RESOLVE AN OPEN CONSTITUTIONAL QUESTION REGARDING THE LIMITS ON RETROACTIVE COST-SPREADING LEGISLATION.

The petitioner urges this Court to grant its petition for a writ of certiorari because it provides this Court with an opportunity to address an important, open question regarding the outer bounds of retroactive cost-spreading legislation left unresolved in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 26-27 (1976), and in subsequent cases. *See Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 647-49 (1993) (O'Connor, J., concurring); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228-29 (1986) (O'Connor, J., concurring). The Coal Act burdens Eastern, a participant in the coal industry between 1950 and 1965, with costs arising from "causes other than [Eastern's] conduct." *Turner Elkhorn*, 428 U.S. at 25-26. This Court has not yet addressed the constitutionality of this "difficult problem" under the Fifth Amendment. *Id.* at 26-27.

A. *An Open Constitutional Question Exists*

This Court established the basic standard for review of retroactive economic legislation in *Turner Elkhorn* and subsequent decisions. "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.* at 17. As this Court said in *Gray*, "the retroactive application of the legislation" must "itself [be] justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). However, the Court has not explored the precise dimensions of rationality review in the context of retroactive cost-spreading legislation.

In *Turner Elkhorn*, several coal mine operators challenged the facial constitutionality of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 (the "Act"), which required coal operators to provide benefits to former miners suffering from pneumoconiosis (so-called "black lung disease"). *See* 428 U.S. at 8-9. The operators contended that requiring the payment of benefits for miners who left employment in the industry before the effective date of the Act was arbitrary and irrational because it imposed retroactive liability for completed acts that were legally proper and, at least in part, unknown to be dangerous at the time they were completed. *See id.* at 12, 15. Rejecting this argument, this Court held that the Due Process Clause of the Fifth Amendment posed no bar to "requiring an operator to provide compensation for a former employee's death or disability . . . arising out of employment in its mines," regardless of when the miner left the coal industry. *Id.* at 19-20.

In addressing the constitutionality of a specific portion of the Act, this Court emphasized the importance of a connection between the operator's conduct and the liability imposed by the statute:

> To the extent that the [Act] . . . is viewed as requiring compensation for damages resulting from death *unrelated to the operator's conduct*, its application to employees who terminated their employment before the Act was passed would present difficulties not

> encountered in our prior discussion of retroactivity. . . . The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

428 U.S. at 24-25 (emphasis added). Because the Court then concluded that the requisite connection existed in the case before it, these "difficulties" were preserved for another day. *See id.* at 25-27.

Similarly, in *Concrete Pipe* this Court rejected an as-applied, substantive due process challenge to retroactive withdrawal liability imposed pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *See* 508 U.S. at 639. The employer in *Concrete Pipe* had withdrawn from a multiemployer pension plan with a ten-year vesting period after participating for three and one-half years. *See id.* at 605, 607, 609-613. The employer argued that it had not employed anyone long enough to earn vested benefits, and thus retroactive imposition of liability for a share of the pension plan's unfunded vested benefits was irrational. *See id.* at 636-37. However, because employees had earned transferable service credits that could be combined with service credits from other employment to obtain vested status, this Court concluded that the employer had directly increased the pension plan's liability. *See id.* at 638. Thus, the employer's retroactive liability was rationally related to its participation in the plan. *See id.*

Justice O'Connor concurred in the *Concrete Pipe* opinion, but wrote separately in part to reiterate a point that she had made in her concurrence to this Court's *Connolly* decision. *See id.* at 647. This Court's "recent cases leave open the possibility that the imposition of retroactive liability

on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26, and *Gray*, 467 U.S. at 733).

The "difficult problem" identified in *Turner Elkhorn*, and noted repeatedly since by Justice O'Connor in *Connolly* and *Concrete Pipe*, remains unresolved because the legislation in those prior cases "serve[d] to spread costs in a rational manner—by allocating to the operator an actual cost of his business." *Turner Elkhorn*, 428 U.S. at 24-25. In each instance, the plaintiff made a direct, causal contribution to the economic costs that retroactive legislation later sought to address. *See id.* at 24-25; *Concrete Pipe*, 508 U.S. at 638; *see also United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989) (retroactive deduction from tribunal award to corporation was rational where the deduction was used to defray the expenses of the tribunal).

Because *Turner Elkhorn* and its progeny each involved cost-spreading to parties directly responsible for the economic conditions that prompted Congress to enact retroactive legislation, this Court has not had an opportunity to consider the strength of the connection to past conduct that is necessary to justify retroactive legislation. For example, is it ever rational to shift current costs of operation to former industry participants without regard to their actual contribution to the economic difficulty that lead to congressional action? If actual contribution is required, does mere historical participation in an industry suffice to justify retroactive cost-shifting of current operations in the absence of a direct "causal" contribution by former participants to current funding shortfalls? If some causal connection is required to justify retroactive cost-

spreading legislation, must the degree of connection be stronger the farther back the retroactive scope of the legislation reaches?

Such questions implicate the broader issue left unresolved in prior decisions as to the reasonable limits on congressional power to impose retroactive liability as a cost-spreading device. *See Turner Elkhorn*, 428 U.S. at 42 (Powell, J. concurring). "[T]he Court has never intimated that Congress possesses unlimited power to 'readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations.'" *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring). To the contrary, the strong implication from prior decisions is that such legislation is unconstitutional when it imposes costs on a party whose conduct did not engender the burdens the legislation was designed to address. *See Concrete Pipe*, 508 U.S. at 609; *id.* at 649 (O'Connor, J., concurring); *Sperry*, 493 U.S. at 64-65; *Turner Elkhorn*, 428 U.S. at 17-19; *id.* at 42, 45 n.9 (Powell, J., concurring).

B. *The First Circuit Failed to Conduct the Correct Rational Basis Analysis for Retroactive Cost -Spreading Legislation*

The First Circuit failed to recognize the appropriate contours of rational basis review for retroactive cost-spreading legislation discernable from this Court's prior decisions.[5] As described above, this Court previously has suggested that legislation using retroactive liability as a cost-spreading device is irrational and arbitrary when it imposes

[5] As noted by the First Circuit, there can be little argument that the Coal Act imposes retroactive liability on Eastern, in that it "attaches new legal consequences to events completed before its enactment." A-11 (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

costs on a party whose conduct did not cause the economic burden the act was designed to address. Despite the extensive discussion in Eastern's briefs, the First Circuit ignored this aspect of this Court's Fifth Amendment jurisprudence and found that Eastern's Coal Act liability was rational because Eastern had implicitly created an expectation of lifetime health benefits among the miners it employed[6] and participated in the selection of a predecessor funding mechanism for those benefits that proved inadequate.[7] *See* A-14-15. Because Eastern did not contribute to the expansion of the beneficiary pool or to the decline in the resources of the Funds, the Coal Act burdens Eastern with costs arising from "causes other than . . . [Eastern's] conduct." *Turner Elkhorn*, 428 U.S. at 25-26.[8]

[6] Eastern rejects the view that pre-1974 signatories contributed to expectations of lifetime benefits; the terms of the pre-1974 NBCWAs certainly were to the contrary, and no reasonable person reading them would think that they made any such promise. But even assuming that such expectations became reasonable over the years, as described below, they cannot justify Eastern's retroactive liability under the Coal Act.

[7] It is ironic that the First Circuit mentions Eastern's participation in the selection of a funding mechanism as support for the rationality of Eastern's Coal Act liability. The funding mechanism was in fact forced on the coal operators by the UMWA. *See supra* note 3.

[8] The First Circuit's holding runs counter to this Court's recent reaffirmation of the principle that where its precedent is directly applicable, "yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, __ U.S. __ (June 20, 1997) (No. 96-552) (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The Supreme Court precedent directly applicable to this case is *Railroad Retirement Board* v. *Alton R.R.*, in which this Court unanimously rejected as violative of Due Process a one-year reach back provision requiring all interstate railroads to contribute to an employee retirement fund whose beneficiaries included employees who "within one year prior to the date of enactment were in the

Congress enacted the Coal Act because the UMWA benefit plans were facing a funding crisis that left the plans unable to provide health benefits. The funding crisis was caused principally by a significant number of signatory operators either leaving the coal business entirely or shifting to non-UMWA miners and then ceasing to pay premiums to the UMWA benefit plans. Eastern, unlike those operators, did not dump or abandon its retirees by ceasing to pay premiums. Rather, Eastern took the prudent step of creating a substitute, a fully capitalized subsidiary, that assumed Eastern's obligations to the UMWA benefit plans and continued to pay premiums up until the enactment of the Coal Act. Unlike *Turner Elkhorn* and *Concrete Pipe*—and unlike all of the Courts of Appeal cases that have upheld the Coal Act under the Due Process Clause—the actions of the party saddled with staggering retroactive liability in this case were not among the catalysts producing the specific harm that the challenged statute was designed to solve.

It is true that Eastern, along with others, including the federal government, participated in the creation of the original UMWA health benefit plan. Yet neither the Coal Commission nor Congress has suggested that the original funding mechanism was inadequate to fund the benefits provided by those plans or any future benefits then "expected" by participants in those plans. It was only beginning in 1974, almost a decade after Eastern's departure from the industry,

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service of any carrier." 295 U.S. 330, 345 (1935). Although it is clearly relevant, the First Circuit chose not to apply *Alton*, stating that "*Alton* . . . is no longer good law." A-16. The First Circuit's refusal to comply with this Court's clear statement on the importance of following directly controlling Supreme Court precedent serves to strengthen the bases for granting Eastern's petition for review.

that successor wage agreements guaranteed lifetime retiree health benefits and significantly enhanced the plans' benefits. It was the failure adequately to fund these guaranteed benefits and to fulfill the *explicit* expectations created by the successor agreements that led Congress to enact the Coal Act.

The "injury" addressed by the Coal Act arose because the UMWA fund was unable to meet its obligations, not because a prior generation of companies may or may not have created certain expectations. Rationally, the mere contribution by an industry member to once modest expectations of certain miners should hardly be sufficient to justify such sweeping retroactive liability; rather, it is the failure to satisfy those expectations that is the determinative factor. Because Eastern, through EACC, maintained its financial commitments to its miners by paying into the benefit funds, Eastern's conduct cannot be said to be a contributing factor to the funding crisis that Congress sought to remedy. Indeed, given the explicit creation of guaranteed benefits after 1974, the need to pay retirees' health benefits would have existed regardless of whether Eastern earlier had made any implicit promises of lifetime benefits.

C. *Review in this Case is Justified by Principles of Fairness, Rationality, and Sound Policy Inherent in the Fifth Amendment*

As this Court recognized in *General Motors Corp.* v. *Romein*, 508 U.S. 181, 191 (1992), retroactive legislation such as the Coal Act:

> presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of

legitimate expectations and upset settled transactions.

Given the absence of any significant causal connection between Eastern's behavior and the funding crisis, the sweeping retroactive liability imposed on Eastern violates this basic norm of fairness.

But the reasons for accepting Eastern's petition go beyond even basic fairness: applying the Coal Act to Eastern would undermine the very goals of good corporate citizenship that Congress itself intended the Coal Act to achieve. As Senator Rockefeller stated in introducing the legislation, the primary "principle at stake" in designing the Coal Act was "keeping commitments." 137 Cong. Rec. S17,061 (daily ed. Nov. 19, 1991) (statement of Sen. Rockefeller). Unlike the operators this Court has encountered in its due process cases, Eastern kept its commitments to its miners by ensuring that its fully capitalized subsidiary, EACC, continued to contribute to the Funds.

Moreover, imposing liability on Eastern for making the "right" choice at every turn—by agreeing to provide benefits in the first place and by providing for the maintenance of those benefits over the long term—creates perverse incentives for members of other industries that would follow in Eastern's footsteps.

And finally, the First Circuit's analysis represents a judicial proclamation of Congress' unchecked power to use retroactive liability as a cost-spreading device. This Court should grant Eastern's petition for certiorari to contain this sweeping precedent, and to declare that Congress' use of retroactive liability as a cost-spreading device is irrational

and arbitrary when it imposes costs on a party whose conduct did not cause the economic burden that the Coal Act was designed to address.

II. THE COAL ACT, AS APPLIED TO EASTERN BY SSA, TAKES EASTERN'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

Under the Coal Act, Eastern is subject to a staggering assessment that bears only the faintest relationship to Eastern's experience with the UMWA health benefit plans, directly interferes with Eastern's investment-backed expectations, and thus amounts to an uncompensated taking in violation of the Fifth Amendment.

In its decision, the First Circuit erroneously presumed that its finding in the due process context all but necessitated its conclusion of an uncompensable taking. Relying on dicta in *Connolly* suggesting that "it would be surprising" to "discover now" a takings violation where no due process violation had been found in *Gray* or *Turner Elkhorn*, *see Connolly*, 475 U.S. at 223, the First Circuit elevated this Court's case-specific aside to the level of a "warn[ing]" that when substantive due process exists, a finding of an uncompensable taking will almost certainly follow, *see* A-19. The First Circuit's presumption misreads the takings jurisprudence of this Court and raises the unsettled question of the doctrinal relationship between substantive due process and regulatory takings. In addition, the First Circuit's faulty initial premise produced a distorted version of the "ad hoc" standard of review under the Takings Clause, and a result far beyond the limitations on government power established in *Concrete Pipe* and earlier cases. This case therefore presents this Court with an opportunity to refine and extend its takings

jurisprudence, and to correct the gross unfairness produced by the application of the Coal Act to Eastern.

A. *The First Circuit Erroneously Merged the Due Process and Takings Clauses*

Neither precedent nor logic supports the virtually dispositive weight placed by the First Circuit on its due process analysis in assessing whether Coal Act liability results in a taking as to Eastern. Apart from the case-specific comment in *Connolly*, this Court has left unclear the nature of the relation it might find between the doctrines of takings and of substantive due process in assessing the constitutionality of retroactive legislation.[9] Both issues may certainly arise in challenges to economic legislation, and neither is proven merely by showing that "legislation requires one person to use his or her assets for the benefit of another." *Connolly*, 475 U.S. at 223. However, neither in *Connolly* nor in *Concrete Pipe* does the Court suggest, much less "warn," that the constitutional analysis under one doctrine should necessarily inform the analysis of the other.

Both in their textual separation in the Constitution and as elucidated by the Court, the takings and due process doctrines each retain distinct meaning and require analysis under independent standards of review. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) ("[T]here is no reason to believe . . . [that] the standards for takings challenges, due process challenges, and equal

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[9] Numerous scholars have noted the confusion between the Due Process and Takings Clauses in an economic context. *See, e.g.*, Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 n.40 (1988); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980).

protection challenges are identical . . . ."). Moreover, as detailed below, the established ad hoc takings analysis reiterated in *Connolly* is, on its face, substantively different from the due process standard of rationality review. To suggest that where due process is satisfied, one is presumptively unlikely to find a takings violation subverts the historical separation of the two doctrines, disregards their logical meaning, and undermines lower courts' ability to apply the takings precedents of the Court.

B. *The First Circuit's Erroneous Application of the Ad Hoc Factors*

No "set formula" exists in Takings Clause cases involving economic legislation; rather, "ad hoc, factual inquiries into the circumstances of each particular case" are appropriate. *E.g.*, *Connolly*, 475 U.S. at 224; *see also Concrete Pipe*, 508 U.S. at 643. The inquiry is case-by-case—and thus the Coal Act may effect a taking as applied to one company, *see, e.g., Unity Real Estate Co.* v. *Hudson*, 889 F. Supp. 818, 835 (W.D. Pa. 1995), but not as applied to another, *see, e.g., LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 494-96 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995). With respect to Eastern, the First Circuit nominally applied the accepted factors, but in a manner that effectively and incorrectly reshaped this Court's takings jurisprudence.

1. *The Investment-Backed Expectations Factor*

The "investment-backed expectations" inquiry in a Takings Clause analysis examines: (1) what the reasonable expectations of the burdened party were or should have been at the time it took the relevant actions, *see, e.g., Concrete*

Pipe, 508 U.S. at 646; *Connolly*, 475 U.S. at 227; and (2) whether previous government involvement in the area undermines the reasonableness of any prior expectation, *see, e.g., Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 226-27. Rather than conducting a probing inquiry on this issue, the First Circuit simply concluded that Eastern had "contributed" to miner expectations in an industry with a "pattern of federal involvement," and therefore "Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation generated." A-20. This indifferent analysis overlooked the necessity for any objective inquiry into Eastern's actual expectations. Moreover, the court fashioned a standard for the "investment expectations" factor that incorrectly assumes that a general history of federal involvement in an industry is sufficient to justify virtually any retroactive liability. *See Concrete Pipe*, 508 U.S. at 649 (O'Connor, J., concurring).

As shown below, when judged from the perspective of 1965, the imposition of a retroactive $100 million liability on Eastern interferes with reasonable investment-backed expectations to an unprecedented degree. When Eastern completed transferring its coal business to EACC in 1965 —a step necessitated by capital raising requirements— Eastern reasonably expected that EACC would stand in the shoes of Eastern for all "financing, liability and operational purposes," including both known and unknown liabilities, and EACC in fact did so for more than 25 years. *See* JA 203, 209.

Additionally, the NBCWAs themselves reflected the expectation that, once each of the contracts had expired, the operator would have no further contribution obligations. Coal operators made set contributions to the Fund only during the effective period of the NBCWA they signed; they were not

required to provide, let alone guarantee, any benefit levels. Indeed, during the time of Eastern's involvement, beneficiaries of the plan were specifically told that benefits were revocable and not vested, *see* JA 129-130, and the Fund trustees frequently exercised their authority to alter, rescind, or reduce particular benefits, *see* JA 128-132.

Moreover, during the entire period between 1947 and 1964 that Eastern was a signatory to the agreements, no existing statute suggested that mere participation in a defined contribution plan would obligate Eastern to continue providing benefits to the same miners (and their beneficiaries) for life. As Justice O'Connor stated in her concurrence in *Concrete Pipe*, 508 U.S. at 649, "[s]urely the employer that joined a multiemployer plan before *ERISA* had been promulgated—before Congress had made employers liable for unfunded benefits—might have a *strong constitutional challenge* to retroactive withdrawal liability." (emphasis added.) It is incorrect to suggest, as does the First Circuit that employers may be subject to retroactive liability simply because they have "long been subject to federal regulation." *Id.* (O'Connor, J. concurring) (internal quotations omitted). While some courts have observed that "federal intervention to avoid instability [in the coal industry] was foreseeable," *Davon*, 75 F.3d at 1129; *see also Blue Diamond*, 79 F.3d at 525, that is a far cry from saying that the Coal Act's liability scheme was foreseeable.[10]

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[10] This conclusion is buttressed by the fact that, while the federal government had indeed taken over coal mines at several points surrounding World War II, those actions often resulted in successful Takings Clause claims by the coal companies. *See. e.g., United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). Thus, federal intervention may have been foreseeable in 1965 based on past events, but the legal fallout from those events would have led coal companies to expect that they would be compensated for losses caused by such intervention.

Here, then, is the great irony of this case: a company in 1965 that wished to leave the coal business and, in the exercise of impressive foresight, took into account the possibility of rational federal intervention more than 25 years later to enforce its employees' future expectations of lifetime benefits, would have done *exactly* what Eastern did. It would have created a substitute company, fully capitalized that company, transferred all of its coal-related assets and liabilities to that company (including its coal-related employees), and required that company to continue paying the appropriate assessments into the UMWA funds. Because that is precisely what Eastern did, Eastern's expectation as of 1965 that it would not face liability was eminently reasonable, and its situation is thus readily distinguishable from those of other companies to have challenged the Coal Act.

2. *The Economic Proportionality Factor*

As noted above, the impact of the Coal Act on Eastern is currently estimated at $100 million, a severe economic impact by any standard. Of course, the size of the liability alone, however great, does not end the inquiry. For Takings Clause purposes, the question is whether Eastern's liability is "out of proportion to its experience with the plan," *Concrete Pipe*, 508 U.S. at 645 (quoting *Connolly*, 475 U.S. at 226). According to the First Circuit, this prong of the analysis is satisfied because Eastern's liability is calculated in relation to the number of former employees assigned to it. This superficial approach misreads the serious inquiry necessary to satisfy the Takings Clause.

Recent decisions demonstrate that, for the proportionality inquiry to have any meaning, it must consider

the strength of the connection between the property owner and the object of the statute. In both *Connolly* and *Concrete Pipe*, for example, the Supreme Court considered whether the imposition of withdrawal liability under the MPPAA constituted a taking. The MPPAA imposes liability *only* on employers that withdraw from multiemployer plans and *only* to the extent necessary to avoid under funding *caused* by each such withdrawal. Every withdrawing employer therefore is by definition part of the problem the statute was designed to correct; the Court readily concluded that the liability was proportional to the employer's experience with the plan. *See Connolly*, 475 U.S. at 225-26; *Concrete Pipe*, 508 U.S. at 645.[11]

With respect to the Coal Act, other Courts of Appeal have concluded that the relationship between the liability and the number of miners employed by the operator satisfies the "proportionality" standard — not just because of some mathematical formula, but because it "rationally apportions future financial responsibility according to past participation" in the plans. *E.g.*, *LTV*, 53 F.3d at 494. The meaning of "proportionality" was informed by the particular circumstances of each operator. In each instance, the operator had arguably contributed to the crisis in the UMWA funds by leaving the coal business without providing for

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[11] In the context of land use regulation, the Court has noted the constitutional necessity of "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy," *Pennell* v. *City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). Thus, land use regulations consistent with such a cause-and-effect relationship will be upheld, *see, e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), while those inconsistent with it may be struck down, *see, e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

continued contributions to the funds on behalf of their former employees.

Yet, rather than considering whether Eastern's Coal Act liability is proportional to its "experience" with the old UMWA Funds, *see Connolly*, 475 U.S. at 226, the First Circuit erroneously limited its evaluation of proportionality to the relationship between Eastern's Coal Act liability and the number of miners it once employed. *See* A-20-21. Such an assessment ignores the reality that Eastern, through EACC, fulfilled its own financial commitment to the miners it employed, and did not participate in the creation of the financial crisis that prompted Congress to act. The First Circuit's crabbed vision of takings "proportionality" impaired its ability to analyze this basic fact. There is no proportionality *whatsoever* between Eastern's conduct and the crisis in the UMWA funds that Congress sought to resolve.

3. *The Nature of Governmental Action Factor*

With respect to the third prong of the Takings Clause inquiry —"the nature of the governmental action," *Connolly*, 475 U.S. at 225 — the First Circuit again misunderstood, and therefore did not apply, the correct standard of review. As applied to Eastern, "the character of the Government regulation here is extraordinary." *Hodel* v. *Irving*, 481 U.S. 704, 716 (1987) (finding a taking based principally on the character of the governmental action).[12] In analyzing this

[12] It should be noted that as applied to Eastern, the Coal Act lacks any "average reciprocity of advantage," a feature that "has been recognized as a justification of various laws." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *cf. Keystone*, 480 U.S. at 491-92. Because Eastern has left the coal business completely, and none of its remaining subsidiaries are coal-related,

prong, however, the First Circuit was satisfied by a superficial analogy between the Coal Act and the MPPAA reviewed by the Court in *Gray*, *Connolly*, and *Concrete Pipe*. Since each statute is a "public program that readjusts economic burdens, and the funds collected are paid to a private benefit fund, not to a government entity," A-22, the First Circuit concluded that this prong of the takings analysis had been satisfied. To satisfy the criteria established by this Court, however, the First Circuit should have addressed the glaring differences between the Coal Act and the MPPAA.

First, there is a vast difference in scope between the Coal Act's period of retroactivity of approximately forty years and the MPPAA's retroactive period of just five months. *See Gray*, 467 U.S. at 730-31 (stating that the Court was "loathe to reject" the "common practice" of "enact[ing] retroactive statutes 'confined to short and limited periods required by the practicalities of producing national legislation . . . .'"). Second, and more important, the MPPAA was designed to solve a particular problem — the underfunding of multiemployer pension plans caused by employer withdrawal — and it does so by imposing liability *only* upon employers who in fact withdraw from such plans, *i.e.*, who are part of the problem the statute seeks to correct. Although the Coal Act's objective is similar — "to restore financial stability and viability to multiemployer benefit plans threatened by employer withdrawals," *LTV*, 53 F.3d at 496 — it carries out its objective by imposing liability on Eastern, a company that was never part of the problem because it *never* abandoned miners or otherwise threatened the stability of the UMWA benefit plans.

Eastern gains nothing at all in exchange for the considerable contribution SSA would have Eastern make to the Combined Fund.

In sum, the First Circuit effectively applied the wrong standard of review to the Takings Clause issue. This Court should grant the petition for certiorari to clarify the relationship between the Due Process and Takings Clauses to establish the limits of Congress' takings authority, and correct the erroneous result reached by the First Circuit.

Conclusion

For all of the forgoing reasons, this petition for certiorari should be granted.

JOHN T. MONTGOMERY
Counsel of Record
ROBERT DANIEL O'CONNOR
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioners

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 96-1947

EASTERN ENTERPRISES,
PLAINTIFF, APPELLANT,
V.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[HON. MARK L. WOLF, *U.S. District Judge*]

BEFORE SELYA, *Circuit Judge*, CYR, *Senior Circuit Judge*, AND STAHL, *Circuit Judge*.

John T. Montgomery, with whom David C. Kravitz and Ropes & Gray were on brief, for the appellant.
Sushma Soni, with whom Frank W. Hunger, Assistant Attorney General, Donald K. Stern, United States Attorney, and Douglas N. Letter, Attorney, Appellate Staff, Civil Division, Dep't of Justice, were on brief, for the federal appellee.
Peter Buscemi, with whom David Lubitz, Morgan, Lewis & Bockius LLP, John R. Mooney, Elizabeth A. Saindon, Mooney, Green, Baker, Gibson & Saindon, P.C., and David W. Allen, Office of General Counsel, UMWA Health and Retirement Funds, were on brief, for appellees UMWA Combined Benefit Fund and its Trustees.
Kenneth A. Sweder, with whom Howard M. Brown, Thomas M.

Looney, and Stroock & Stroock & Lavan were on brief, for appellees Peabody Holding Co., Eastern Associated Coal Co., and Coal Properties Corp.

April 7, 1997

SELYA, *Circuit Judge*. In this high-stakes appeal, plaintiff-appellant Eastern Enterprises (Eastern) challenges both the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §§ 9701-22 (1994) (the Coal Act), and the interpretation placed upon it by the Social Security Administration (SSA). Eastern claims that the statute, as synthesized by the agency, distorts Congress' intent, offends principles of substantive due process and equal protection, and works an uncompensated taking of a kind proscribed by the Fifth Amendment.

The administrative law argument is new but lacking in merit. The constitutional arguments are retreads which have taken their lumps from courts of appeals in five other circuits. *See Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996); *Blue Diamond Coal Co.* v. *Secretary of HHS* (*In re Blue Diamond Coal Co.*), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). Although these decisions are not binding upon us, we find them convincing. Consequently, we affirm the district court's entry of summary judgment adverse to Eastern.

I. DIGGING THE TUNNEL

While coal may or may not be "a portable climate," Ralph Waldo Emerson, *The Conduct of Life* (1860), the industry has witnessed a series of particularly vitriolic labor disputes over the past half-century. We do not chronicle these disputes in their entirety, but confine ourselves to excavating a few nuggets that are important to a resolution of this appeal.

In 1946, motivated principally by miners' demands for decent health and retirement benefits, the United Mine Workers of America (UMW) called a nationwide strike. To forestall industrial paralysis, President Truman nationalized the coal mines. Following the execution of what came to be known as the Krug-Lewis Agreement, the government relinquished control of the mines. The UMW and the Bituminous Coal Operators' Association (BCOA), a multiemployer group of coal producers, then executed the first National Bituminous Coal Wage Agreement (NBCWA). The 1947 NBCWA specified terms and conditions of employment in the mines and, among other things, extended the Krug-Lewis Agreement by providing a modicum of health and pension benefits to miners.

A new NBCWA, signed in 1950, provided that in exchange for union concessions relative to mechanization of the mines, the BCOA would create a welfare and retirement fund financed by a per-ton levy on coal mined by signatory coal producers. The 1950 Fund was designed to receive employer contributions and use the funds to provide health benefits to current and retired miners (and, in certain cases, to family members).[1] Several subsequent NBCWAs were signed during

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[1] Subsequent references herein to health benefits for miners should be taken to include those situations in which spouses, relatives, and dependents also are eligible for benefits.

the next two decades. None of them altered this basic benefits format.

In 1974, demographic changes and the passage of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, led to a restructuring of the 1950 Fund. In its place, the 1974 NBCWA established four separate multiemployer plans, two covering pension benefits and two dealing with allied benefits. The nonpension entities were the 1950 Benefit Plan, which provided health benefits to coal workers who retired before 1976, and the 1974 Benefit Plan, which covered those who retired on or after January 1, 1976. The 1974 NBCWA explicitly guaranteed lifetime health benefits for enrolled miners. No such express warranty had appeared in any earlier agreement.

In response to continued labor unrest and unresolved concerns over benefits, the 1978 NBCWA incorporated a new provision assuring health care for "orphaned" miners (that is, miners whose employers had abandoned either the coal industry or the UMW), together with complementary "guaranty" and "evergreen" provisions. The net effect of these changes was to obligate signatory coal producers to redeem the promise of lifetime health benefits even after the current pact expired.

Treating the symptoms rather than the cause has never been a very effective method of curing systemic ills. So here: the very economic factors which prompted the remedial measures inserted into the 1974 and 1978 NBCWAs continued to plague the industry. In particular, the cost of health care rose steeply throughout the 1980s, the number of orphaned miners increased dramatically as more and more employers jumped ship, and superannuation swelled the retired miners' ranks. By 1990, contributions from a shrinking number of coal producers proved insufficient to fund the four benefit plans, and those plans were

awash in red ink.

The UMW struck the Pittston Coal Company for nearly 11 months in 1989-90. This work stoppage proved to be the straw that broke the dromedary's back. The Secretary of Labor intervened, brokered a rapprochement, and, as part of the negotiated settlement, set up a commission to study the industry's problems and recommend ways of rejuvenating the benefit plans. The Coal Commission issued its report in late 1990. Congress' response to the commission's suggestions took the form of the Coal Act. The Act folded the 1950 and 1974 Plans into a single UMW-sponsored entity (the Combined Fund) and wove an elaborate tapestry designed to ensure that all retirees who were eligible to receive health benefits from the preexisting Plans would obtain them from the Combined Fund.

The linchpin of the statutory scheme is contained in section 9706 of the Coal Act, which directs the assignment of every eligible beneficiary to a "signatory operator" who is still "in business."[2] The signatory operator (SO) must then pay premiums to the Combined Fund sufficient to defray the estimated annualized health care costs for that beneficiary, as well as an additional amount (proportionate to the number of initial assignments) earmarked to provide coverage for orphaned retirees. *See* 26 U.S.C. § 9704. The assignment hierarchy is administered under the aegis of the SSA. *See id.* at § 9706(a). The hierarchy is structured along the following lines: a retired miner is assigned first, if possible, to an SO which both signed the 1978 (or any subsequent) NBCWA and also employed him for at least two years more recently than any other SO; if no SO

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[2] A signatory operator is statutorily defined as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). A firm is considered to be "in business" if "such person conducts or derives revenue from any business activity, whether or not in the coal industry." *Id.* at § 9701(c)(7).

fits that description, the retired miner is assigned to the 1978 (or any subsequent) SO which employed him most recently for any length of time; and if there are still no takers (that is, if the retired miner never worked for a 1978 or subsequent SO which is still in business), he is assigned to that SO of any earlier agreement(s) which employed him for the longest period of time. *See id.* at § 9706(a)(1-3). The assignment formula has a safety valve in that the Act preserves the right of any SO which is assigned a miner to seek contribution from other persons in a separate civil action. *See id.* at § 9706(f)(6).

II. MINING THE ORE

The appellant mined coal from 1946 through 1965, and, although it thereafter left the industry, it remains in business as defined by the Act. It is a signatory operator, having executed the 1950 NBCWA and some later pacts (but not the 1974, 1978, or any subsequent NBCWA).

Samuel East dug coal for Eastern from 1946 to 1960 and for two other companies from 1960 to 1967. East (who had retired and was eligible to receive benefits under earlier Plans) was never employed by a signatory to the 1978 (or any more recent) NBCWA. Thus, because Eastern was the SO which had employed East for the longest period of time, the SSA assigned him and his wife to Eastern pursuant to Coal Act § 9706(a)(3).

Displeased by the assignment, Eastern filed suit against the Commissioner of Social Security, the Combined Fund, and the Fund's Trustees. Eastern argued that the Coal Act, as applied to it, crossed the constitutional line at several points. After the denial of Eastern's parallel administrative appeal, in which it argued that Eastern Associated Coal Company (EACC), the wholly-owned subsidiary which took over Eastern's coal

operations in 1966 and which was sold to Peabody Holding Company (Peabody) in 1987, should have been assigned responsibility for the Easts, Eastern amended its complaint to allege a violation of the Administrative Procedure Act, 5 U.S.C. § 706 (1994). Eastern also filed an action against Peabody and EACC seeking indemnification for the liability resulting from the East assignment.[3] Ruling on cross-motions for summary judgment in the principal case, the district court found in favor of the defendants. The proceedings in the third-party action have been stayed pending resolution of this appeal.

III. LIGHTING THE FIRE

Eastern asserts that the administrative assignment decision must be overturned as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because section 9706(a) is silent on the question of successor liability, Eastern's thesis runs, the law is ambiguous and the SSA ought to have filled the resultant vacuum in such a way as to have dictated assignment of the Easts to EACC.

This novel claim is skillfully presented. Still, innovation is not a certain harbinger of forensic success. The road not taken is oft forsaken for good reason. When agency action is based on the agency's interpretation of a statute entrusted to its care, a reviewing court must undertake a two-step inquiry. *See Chevron U.S.A Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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[3] It should be noted that the Easts (at least Mrs. East, as Mr. East is now deceased) are a test case. The SSA intends to assign approximately 1400 similarly situated miners and beneficiaries to Eastern.

expressed intent of Congress." *Id.* at 842-43. Only if the statute on which the agency bases its action is "silent or ambiguous with respect to the specific issue" must the court inquire "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In this instance, the first step of the *Chevron* pavane is fully dispositive. Section 9706(a) of the Coal Act unambiguously delineates a classification regime - and that regime, literally applied, requires East's assignment to the appellant as the pre-1978 signatory which employed him for the longest interval. Moreover, because section 9706(a)(3) speaks of assignment to "*the* signatory operator" (emphasis supplied) which employed the retiree for the greatest period of time, the section by its very terms cannot produce multiple assignments of a single individual.

Eastern's claim that Congress overlooked the possibility of assignment to successors of an SO is unpersuasive. It is a basic principle of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) (citation omitted). This principle obtains here; at two other points the Coal Act makes explicit reference to successors.[4]

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[4] In defining a "related person to a signatory operator," 26 U.S.C. § 9701(c)(2)(A) provides that "[a] related person shall also include a successor in interest. . . ." Another provision of the Coal Act states in pertinent part:

> If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary . . . to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter.

26 U.S.C. § 9706(b)(2).

Then, too, section 9706(f)(6) provides recourse for those wishing to seek contribution from their successors. We regard this proviso as a patent indication that Congress did not intend to deal with the question of successor liability in section 9706(a).

To sum up, reviewing the language and architecture of the Coal Act as a whole - a permissible inquiry in carrying out the first step of a *Chevron* analysis, see *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) - we think it is obvious that Congress purposely omitted any reference to successors in writing section 9706(a)'s assignment scheme. *See generally Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784, 794 n.6 (1st Cir. 1996) (rejecting idea that statutory silence necessarily indicates ambiguity; in an appropriate context, failure to mention an item demonstrates specific congressional intent). Because the Easts were properly assigned by the SSA in pursuance of the plain terms of the Coal Act, we reject the appellant's administrative law argument.

IV. STOKING THE FURNACE

The appellant next asserts that the Coal Act violates its substantive due process rights. We accord plenary review to this challenge, *see*, *e.g.*, *United States* v. *Zorrilla*, 93 F.3d 7, 8 (1st Cir. 1996), mindful, however, that statutes which regulate commercial burdens and benefits are clothed in a formidable presumption of constitutionality. *See Usery* v. *Turner Elkhorn*

Mining Co., 428 U.S. 1, 15 (1976). The strength of this presumption is evinced by the fact that the Supreme Court has not invalidated any piece of purely economic legislation on substantive due process grounds in more than 60 years. Given this mountainous topography, Eastern faces an uphill climb.

The slope is made steeper -- indeed, Sisyphean -- because economic legislation, enacted under Congress' Commerce Clause power, is entitled to the most deferential level of judicial scrutiny. Where, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted "in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15. In other words, as long as "the State's objective is legitimate and the taxonomy adopted is rationally related to achieving that objective, then the law does not transgress due process." *Baker* v. *City of Concord*, 916 F.2d 744, 755 (1st Cir. 1990).

As if this standard were not generous enough, a reviewing court must uphold the law if any rational basis conceivably exists for it, regardless of whether Congress had that particular basis in mind when it voted passage. *See FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991). Emphasizing the narrowness of judicial review in this corner of our constitutional jurisprudence, the Supreme Court has declared unhesitatingly that if a statutory scheme is "rational and not arbitrary," Congress has "absolutely no obligation" to choose the version of the scheme that a reviewing court "would find to be the fairest." *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Chary of this forbidding legal landscape, the appellant searches for more hospitable terrain. It implies that because the

Coal Act operates retroactively to impose liability on it, the statute should be subjected to some form of heightened judicial scrutiny. This sally pirouettes around a passage from *Turner Elkhorn* in which Justice Marshall wrote: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." 428 U.S. at 16-17. Carefully considered, the quoted passage cannot carry the cargo that Eastern piles upon it.

Legislation is retroactive when it "attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). As applied to Eastern, the Coal Act fits within this rubric; past events -- the employment of East and the signing of various NBCWAs in the 1950s and 1960s -- acquired new legal consequences with the emergence of the new statute. For this reason, other courts of appeals have decided that the Coal Act is retroactive in pertinent part. *See, e.g., Blue Diamond*, 79 F.3d at 523; *Davon*, 75 F.3d at 1122. We agree.

Be that as it may, the Court's cases subsequent to *Turner Elkhorn* indicate that a determination of retroactivity does not alter the level of scrutiny that substantive due process analysis demands. *See Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (explaining that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively"). Analyzing the quoted passage in *Turner Elkhorn*, the *Gray* Court noted that any due process burden was met "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730. As long as "the retroactive application of a statute is supported by a legitimate

legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 729. Accordingly, we hold that heightened scrutiny is not warranted simply because the Coal Act operates retroactively and that the conventional standard -- the rational basis standard -- endures.

Rationality review yields a positive result in this case. The historic importance of coal production in the national economy cannot be gainsaid. Moreover, the nexus between labor peace and the due functioning of the mines is obvious. For the last half-century, persistent labor difficulties within the coal industry have threatened the production of a mainstream energy resource. These difficulties were often sparked by wrangling over the provision of health care benefits for retired mine workers. Viewed against this backdrop, Congress' stated objective -- to resolve these problems by ensuring that multiemployer benefit plans were in place and were adequately funded, *see* 26 U.S.C. § 9701 note -- was entirely legitimate. Consequently, the Coal Act would seem to survive rationality review.

The appellant does not attack this conclusion frontally, but essays a flanking maneuver. It asserts that the method Congress chose to resolve these incipient problems is itself irrational in that it assigns liability for retired mine workers to companies that did not contribute to the conditions which created the problems (and, hence, the need for a dramatic legislative solution). In mounting this campaign, Eastern emphasizes two related points. First, the pre-1974 NBCWAs -- the only ones that Eastern signed -- never promised lifetime health benefits to any miners in so many words. Second, Eastern effectively insulated itself from the 1974 and subsequent NBCWAs (which did explicitly promise lifetime benefits); after all, in 1966 it transferred its coal operations to a wholly-owned subsidiary,

EACC, and EACC, not Eastern, remained in the coal business, signing NBCWAs and contributing to the more recent benefit plans. Thus, Eastern's reasoning runs, EACC, not Eastern, logically should be made to bear the financial brunt of the miners' plight.

There are two gaping flaws in the fabric of Eastern's analysis. In the first place, it is not accurate to claim that only those SOs which executed NBCWAs in or after 1974 created a legitimate expectation of lifetime health benefits for miners. Congress and the Coal Commission both reviewed the historical evidence and concluded that pre-1974 signatories had made an *implicit* commitment to furnish such benefits. *See Lindsey Coal*, 90 F.3d at 694; *Blue Diamond*, 79 F.3d at 522; *Davon*, 75 F.3d at 1124-25. Since Eastern, as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational.

Of course, the appellant is correct in insisting that the commitment distilled by Congress from the historical data was not made explicit in the text of those NBCWAs which were written before 1974. But Eastern reads too much into that omission. To be sure, such an implied commitment might not be enforceable in a civil suit *ex contractu* -- but this is a constitutional challenge, not a breach of contract case. For purposes of due process review, Congress' determination that a commitment was made need not rest upon a legally enforceable promise; it is enough that Congress' conclusions as to the existence and effects of such a commitment are rational. *See Lindsey Coal*, 90 F.3d at 694. The conclusions which Congress reached here measure up to this benchmark. They are, moreover, buttressed by circumstantial evidence, especially the substantial concessions that the coal operators exacted from the miners in

exchange for the implicit commitment to assure lifetime health benefits. A good example can be found in the 1950 labor pact. That agreement, which Eastern signed, created a welfare and retirement fund in consideration for workers' acquiescence in the automation of the mines. *See Holland*, 102 F.3d at 741.

Nor does Eastern's inability to anticipate either the precise consequences of its actions or the form those consequences would take have weight in the due process calculus.

> [I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Concrete Pipe & Prods. of Cal., Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (citations omitted). Lack of foresight does not create constitutional infirmity.

The second hole in the appellant's argument is even more ringent. Eastern insists that the Coal Act was a bail-out of the benefit plans, pure and simple; that it did not contribute to the funding shortfalls which necessitated the bail-out; and, thus, that holding it liable under the Act is bizarre. But this is much too crabbed a view of the historical record. The crisis in retiree benefits occurred in two stages: first, the inculcation of an

expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed. If the expectations had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen. Thus, it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment.

We add one related note. The persistent theme that permeates the appellant's asseverational array is a professed concern about the fairness of assessing present liability for events concluded three decades ago. Leaving to one side the legal rule which directs us to disregard such concerns, *see National R.R. Passenger Corp.*, 470 U.S. at 477, it is clear that the statutory scheme actually takes some pains to shield companies like Eastern from disproportionate liability. Eastern and companies like it are third in the hierarchical order of assignment; they will never feel the statutory sting if a 1978 (or more recent) NBCWA signatory which employed a particular miner still exists, or if any other non-defunct company employed the miner for a longer period of time than they did. Moreover, the right of companies like Eastern to seek recompense from companies like EACC is statutorily preserved. Last but not least, for all the protestations of independence which Eastern makes on EACC's behalf, the fact remains that EACC returned tens of millions of dollars in dividends to Eastern during the post-1966 period. Eastern derived substantial financial emoluments from this spin-off, and it now faces financial consequences as well. The net result may not be the tidiest paragon of fairness, but the Constitution offers Eastern

no refuge.[5]

The appellant makes a last-ditch argument in support of its substantive due process claim. This argument hinges on the Supreme Court's opinion in *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935). But the last six decades have not been kind to *Alton* or to the legal principles upon which the decision rests. *Alton* belongs to an earlier, now discredited doctrinal era, and it is no longer good law.[6] We explain briefly.

A century ago, the Supreme Court indulged a much different outlook on economic legislation, carefully scrutinizing such laws to see if they infringed particular rights, especially the right to contract. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897), illustrates the Court's approach. In striking down a state statute that effectively rewrote marine insurance on Louisiana property if the issuing company had not fully complied with Louisiana law, the Court expressed its adherence to an expansive rendition of the substantive attributes of the Due Process Clause -- a rendition which encompassed not only the individual's right to be free from "physical restraint" but also "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful

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[5] In many respects, the system currently in place is more rational than the alternative that Eastern proposes. The appellant would like us to examine only the present day, while the Coal Act bases liability on actions throughout the time frame when miners' expectations were formed. East's case is typical. He was in Eastern's employ during a 14-year period in which he developed a reasonable expectation of lifetime health benefits. In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step.

[6] We note, moreover, that even if *Alton* were still zoetic, it is readily distinguishable. *See Chateaugay Corp.*, 53 F.3d at 488-89 (distinguishing *Alton*).

calling . . . and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.* at 589 (dictum).

This philosophy matured into a holding in *Lochner* v. *New York*, 198 U.S. 45 (1905), a case in which the Court nullified a state law limiting the number of hours that a baker could work. The *Lochner* Court made manifest its willingness to strike down, in the name of substantive due process, statutes which restricted "the freedom of master and employé to contract with each other in relation to their employment." *Id.* at 64. Justice Holmes dissented, assailing the majority's attempt to read its own philosophy into the Constitution and advocating judicial deference to Congress' economic views. *See id.* at 75.

The *Lochner* tide ran strong for a time. *See, e.g.*, *Coppage* v. *Kansas*, 236 U.S. 1, 14 (1915); *Adair* v. *United States*, 208 U.S. 161, 172-75 (1908). *Alton* represents its high water mark. There, the Court invalidated the Railroad Retirement Act, a "New Deal" statute that required railroads to fund a multiemployer retirement plan whose beneficiaries included "those who within one year prior to the date of enactment were in the service of any carrier." *Alton*, 295 U.S. at 345. The Court's substantive due process analysis focused on the perceived arbitrariness of predicating benefits on a single year of service. *See id.* at 348-49.

From this point forward, the tide ebbed. Just two years after *Alton*, a resipiscent Supreme Court performed an about-face of nearly 180 degrees. In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), the Justices upheld a state-sponsored minimum wage law for women and declared unambiguously that "[t]he Constitution does not speak of freedom of contract. It speaks of

liberty and prohibits the deprivation of liberty without due process of law . . . . [R]egulation which is reasonable in relation to its subject and adopted in the interests of the community is due process." *Id.* at 391. The Court thereafter expressly disclaimed the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine." *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

By the mid-1960s, the Court had embraced Justice Holmes' dissent in *Lochner* and made plain that "[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963). For all intents and purposes, *Lochner* was dead. *See* Laurence H. Tribe, *American Constitutional Law* §§ 8-5 to 8-7 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.4 (5th ed. 1995). *Alton* perished with it.[7]

Further exposition, like a delivery of coal to Newcastle, is unnecessary. For the reasons cited, we decline to adhere to *Alton* and hold instead that the Coal Act, as applied to Eastern, does not offend the substantive component of the Due Process Clause. We add only that this holding also sounds the death knell for the appellant's poorly developed equal protection argument. In cases involving rationality review, a court must apply substantially the same analysis to both substantive due process and equal protection challenges. *See Pearson* v. *Fair*, 935 F.2d

[7] To be sure, the Supreme Court has never explicitly overruled *Alton*, but the Court's comments have made clear that the case should be regarded as a dead letter. *See, e.g.*, *Gray*, 467 U.S. at 733 (refusing to "resuscitate" *Alton* and leaving little doubt as to its lack of vitality); *see also* Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 Duke L.J. 1069, 1069 n.5 (1993) (positing that *Turner Elkhorn* actually overruled *Alton*).

401, 411 n.18 (1st Cir. 1991); *Montalvo-Huertas* v. *Rivera-Cruz*, 885 F.2d 971, 976 n.7 (1st Cir. 1989). Thus, we reject out of hand Eastern's claim that the Coal Act offends the Equal Protection Clause.

V. SIFTING THE EMBERS

The appellant's final argument is premised on the Takings Clause of the Fifth Amendment. The Supreme Court has warned that when a due process argument has proven unavailing, "it would be surprising indeed to discover the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe*, 508 U.S. at 641 (citation and internal quotation marks omitted). There are no such surprises here.

The Takings Clause prohibits the confiscation of private property "for public use, without just compensation." U.S. Const. amend. V. The object of this clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Despite these rhetorical flourishes, claims under the Takings Clause must be approached in a practical, commonsense fashion. In particular, given the pervasiveness of the government's regulatory power, it would be foolhardy to assume "that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986).

A court considering a Takings Clause challenge must undertake a probing, fact-intensive inquiry into the overall circumstances of the case. *See Concrete Pipe*, 508 U.S. at 643; *Connolly*, 475 U.S. at 224. Although this inquiry is not

circumscribed by a predetermined checklist, the *Connolly* Court identified three factors which have "particular significance" in ascertaining the existence *vel non* of a compensable taking. *Connolly*, 475 U.S. at 225. These factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action. *See id.*; *see also Concrete Pipe*, 508 U.S. at 643-45. The *Connolly* and *Concrete Pipe* Courts dealt specifically with Takings Clause challenges to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (MPPAA). Because the Coal Act, like the MPPAA, seeks to fund a multiemployer benefit plan by imposing retroactive liability on employers who withdraw from the plan and/or the industry, we look principally to those cases for guidance.

We turn first to economic impact. Eastern mines this shaft for all it is worth (and then some), arguing that the assignment provisions of the Coal Act, if not invalidated, will subject it to an ultimate liability of roughly $100 million. Even if this figure is accurate -- and the appellees vigorously deny that it is -- "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. at 645. Because this case does not involve the total deprivation of an asset, the focus of our inquiry into the challenged statute's economic impact must be on proportionality. *See id.* The operative question, then, is whether Eastern's liability is reasonably related to its experience with the benefit plans that eventually blended into the Combined Fund. *See Blue Diamond*, 79 F.3d at 525; *Davon*, 75 F.3d at 1127-28; *Chateaugay Corp.*, 53 F.3d at 494-95. In our opinion, the match reflects a sufficient degree of proportionality.

We believe it is highly significant that the extent of

Eastern's statutory liability depends on its links to the provision of health benefits for particular miners. The statutory scheme assigns miners to SOs based on past work experience with a given company. Thus, the scheme saddles a former employer, like Eastern, with liability only for those individuals whom it employed for a relevant (and relatively long) period of time. Furthermore, a firm like Eastern, which has been out of the coal business for over a quarter-century, will be assigned workers only when no post-1977 NBCWA signatory can be found. So viewed, Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans. In situations in which a different former employer either explicitly promised benefits to a particular miner or fostered a greater expectation of benefits than did Eastern (because it employed the miner for a longer period), it will bear the concomitant burden. And, because the liability for orphaned retirees is based on the number of initial assignments made to an SO, those assignments, too, will be proportional.

The fact that the Coal Act contains provisions which moderate the statutory toll is also probative of a constitutionally tolerable economic impact. *See Connolly*, 475 U.S. at 225-26. Here, in addition to the provisions already mentioned (which relieve Eastern entirely of liability whenever a company that created a greater expectation of lifetime health benefits for an individual miner can be found), the Coal Act authorizes the use of $210 million from the 1950 Pension Plan, 26 U.S.C. § 9705, and additional moneys from the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1232(h) (1994), to defray the cost of furnishing health benefits to orphaned miners. These measures, together with the contribution proviso contained in Coal Act § 9706(f)(6), support a determination that the Coal Act does not effect a taking. *See Blue Diamond*, 79 F.3d at 525.

The second element of the *Connolly* analysis involves the extent to which the challenged legislation has interfered with reasonable investment-backed expectations. On this point, the appellant's argument that it could not have foreseen the specific form of intervention that a legislative solution would take distorts the proper inquiry. The Supreme Court has not required prescience but instead has dwelled on the level of regulation in a given area or industry, noting that those who conduct business in historically regulated fields "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645 (citation omitted).

Since the government appropriated the mines in 1946, federal intervention in, and regulation of, the coal industry has been frequent, and the interventions often have been triggered by the issue of health benefits for retirees. Eastern cannot reasonably claim ignorance of this pattern of federal involvement, nor can it feign astonishment when a measure like the Coal Act is passed to forestall further labor unrest. Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered. *See Blue Diamond*, 79 F.3d at 525-26; *Davon*, 75 F.3d at 1128-29; *Chateaugay Corp.*, 53 F.3d at 495-96.

The final element of the *Connolly* triad implicates the nature of the government action. Under applicable precedents, a taking is much more readily found when the government "physically invade[s] or permanently appropriate[s]" assets for its own use than when the claimed deprivation merely "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225; *accord Keystone Bitum. Coal Ass'n* v. *DeBenedictis*, 480 U.S.

470, 488 n.18 (1987). To present this dichotomy is to resolve it. The Coal Act, like the MPPAA, is merely a public program that readjusts economic burdens, and the funds collected are paid to a private benefit fund, not to a government entity. Consequently, cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992), are inapposite. Inasmuch as this factor, like the other two, points toward the Coal Act's constitutionality, there is no basis whatever for the appellant's claim that the statute transgresses the Takings Clause.[8]

VI. CONCLUSION

We need go no further. Because the SSA assigned the Easts to the appellant in compliance with the clear intent of Congress, expressed unambiguously in section 9706(a) of the Coal Act, the appellant's administrative law challenge is unavailing. The appellant's constitutional initiatives fare no better. The Coal Act was motivated by a legitimate legislative purpose; the assignment system which it created lies within the wide universe of rational measures that were available to Congress as vehicles for furthering that purpose; and the statutory scheme, as applied, does not impermissibly confiscate Eastern's property.

Affirmed.

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[8] We are aware that a lone district court has determined, at the preliminary injunction stage, that the Coal Act violated the Takings Clause as applied to a particular operator. *See Unity Real Estate Co.* v. *Hudson*, 889 F. Supp. 818, 835 (W.D. Pa. 1995). But this decision is not persuasively reasoned and its precedential force has been undermined severely by the Third Circuit's summary rejection of a Takings Clause challenge involving the Coal Act. *See Lindsey Coal*, 90 F.3d at 695. Finally, *Unity Real Estate*, on its facts, *see* 889 F. Supp. at 829-31, is easily distinguishable from the case at bar.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

JUDGMENT

WOLF, D.J.

In accordance with the Court's Memorandum and Order dated June 29, 1996, ALLOWING Defendants' Motion for Summary Judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the DEFENDANTS.

By the Court,
/s/ Zita Lovett
Deputy Clerk

Date: July 8, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

ORDER

WOLF, D.J. June 29, 1996

On March 30, 1996, the court issued a Memorandum and Order memorializing its decision, rendered orally on February 1, 1996, denying plaintiff Eastern Enterprise's ("Eastern") motion for summary judgment on statutory grounds and third-party defendant Peabody Holding Company's ("Peabody's") Motion to Dismiss. Eastern has since filed a motion for summary judgment on its constitutional claims. The federal defendant, Shirley Chater as Commissioner of the Social Security Administration (the "SSA"), defendant United Mine Workers of America Combined Benefit Fund and its Trustees (the "Combined Fund"), and Peabody (which includes defendants Eastern Associated Coal Corp. ("EACC") and Coal Properties Corp. ("CPC")), oppose Eastern's motion. The SSA and the Combined Fund have filed

cross-motions for summary judgment on Eastern's constitutional claims.

The parties agree that there are no material facts in dispute and, therefore, that the question of the merit of Eastern's constitutional claims is ripe for resolution. Eastern in essence asserts that the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") is unconstitutional as applied to Eastern because it violates the Due Process and Takings Clauses of the United States Constitution. These arguments have been rejected by each of the several Circuits that have addressed the question of the constitutionality of the Coal Act. *See In Blue Diamond Coal Company, Blue Diamond Coal Company* v. *Secretary of Health and Human Services*, 79 F.3d 516 (6th Cir. 1996); *Davon Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir. 1996); *In re Chateaugay Corp., LTV Steel Company Inc.* v. *Shalala*, 53 F.3d 478 (2d Cir. 1995). This court finds the reasoning of those decisions to be persuasive.

Accordingly, it is hereby ORDERED that:

§ 1. Eastern's motion for summary judgment on the constitutional claims (Docket No. 93) is DENIED.

§ 2. The cross-motions for summary judgment on the constitutional claims of the Combined Fund (Docket No. 97) and of the SSA (Docket No. 101) are ALLOWED.

§ 3. Pursuant to Fed. R. Civ. P. 54(b) final judgment shall now enter for the defendants on Eastern's statutory and constitutional claims because there is no just reason for delay in the entry of final judgment and immediate appellate review of Eastern's

statutory and constitutional claims may moot or substantially narrow the third party claims.

§ 4. By agreement of the parties, claims of third party defendant Peabody are STAYED pending appellate review of Eastern's statutory and constitutional claims, except that during the pendency of the stay, Eastern and Peabody may each serve one set of requests for the production of documents and may each conduct six depositions. However, neither Peabody may file any dispositive motions with the court during the pendency of the stay.

/s/ Mark L. Wolf
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

EASTERN ENTERPRISES,

PLAINTIFF,

V.

DONNA E. SHALALA, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER

WOLF, D.J. March 30, 1996

The following analysis is based upon the transcript of the decision rendered orally on February 1, 1996, denying plaintiff Eastern Enterprises' motion for summary judgment and denying third-party defendant Peabody Holding Company's ("Peabody") motion to dismiss. This memorandum adds citations, revises some of the discussion and deletes certain non-essential matters.

The transcript of the February 1, 1996 hearing is being prepared and may be acquired from the court reporter.

* * *

I. Plaintiff's Motion for Summary Judgment

Plaintiff Eastern Enterprises has filed a motion for summary judgment on its complaint seeking a declaratory judgment that beneficiaries assigned to the plaintiff by the Social Security Administration, pursuant to 26 U.S.C. § 9706(a) (3), and related regulations, should have been assigned to Eastern Associated Coal Corporation ("EACC"), a former subsidiary or affiliate of plaintiff, whose stock was acquired by Peabody in 1987. This court's review is under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*[1] As the parties recognize, the decision of the Social Security Administration is ripe for review on summary judgment.

This dispute concerns the Social Security Administration's assignment of Samuel East, a miner, to the plaintiff as a person entitled to pension benefits under the Coal Act and related regulations.[2] It is undisputed that East did not

[1] For the reasons stated in the Federal Defendant's Opposition to the Motion of Eastern Enterprises to Supplement the Record in Support of Summary Judgment on Statutory Interpretation Claims (Docket No. 63), this court's review should be addressed to the record upon which the challenged action is based. Thus, it does not now appear that the court should consider the decisions of the Social Security Administration regarding the USX/United States Steel Mining Company and Guyan Eagle Investment Company matters that the plaintiff submitted. *See* Memorandum in Support of Eastern's Motion to Supplement and Record in Support of Summary Judgment on the Statutory Interpretation Claims (Docket No. 57); Affidavit of William S. Elias II (Docket No. 58). As discussed *infra*, however, this limitation is not material because the court has read those decisions and finds they do not alter the conclusion that the plaintiff's motion for summary judgment on nonconstitutional grounds is without merit.

[2] 26 U.S.C. § 9706 *et seq.*; 20 C.F.R., Part 422.

work for any company that was a signatory to the 1978 Coal Wage Agreement or any subsequent agreement. Thus, there was no company to which he could be assigned pursuant to 26 U.S.C. § 9706(a) (1) or (2). The parties also do not dispute that prior to the effective date of the 1978 Coal Agreement, East was employed by Eastern Enterprises for a longer period of time than he was employed by any other signatory operator as defined in the Coal Act. Thus, the Social Security Administration assigned East to plaintiff pursuant to its interpretation of 26 U.S.C. § 9706(a) (3).

East's situation, in effect, is a test case. The Social Security Administration evidently intends to assign all similarly situated miners to the plaintiff. Plaintiff asserts that this group of miners is more appropriately assigned to EACC, which, it contends, was the successor to its coal operations. Plaintiff asserts that ultimately Peabody is responsible because when Peabody acquired the stock of EACC it assumed EACC's liabilities. The decision with regard to East is expected, by the normal operation of collateral estoppel, to decide the issue of the propriety of assignments to Eastern Enterprises of similarly situated miners in other disputes between Eastern Enterprises and the Social Security Administration in which the facts are not materially different than those in East's case.[3]

For the reasons stated by the Social Security Administration in its opposition to the motion for summary judgment, the court finds that the Social Security Administration

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[3] *See South Boston Allied War Veterans Council* v. *City of Boston*, 875 F.Supp. 891, 907-908 (D. Mass. 1995) (citing *Allen* v. *McCurry*, 449 U.S. 90, 96, 101 (1980); *Kowalski* v. *Gagne*, 914 F.2d 299, 302 (1st Cir. 1990)).

properly assigned liability for East to the plaintiff pursuant to 26 U.S.C. § 9706(a) (3).[4] The statute is not ambiguous. Rather, the Coal Act statute clearly manifests an intent that the Social Security Administration assign miners like East to the signatory to a pre-1978 Coal Wage agreement which employed the miner for the greatest period of time. If there is a successor to that signatory company which has assumed responsibility for such payments, the pre-1978 signatory operator has a right to bring a civil action for what is, in effect, indemnification.[5]

More specifically, § 9706(a) is not ambiguous. With regard to East, the statute clearly prescribes assignment to plaintiff. The statute's failure to provide for the assignment of East to the plaintiff's alleged successor, EACC, was neither an oversight nor an ambiguity. Because the Coal Act makes several references to successors,[6] the court infers that the omission of the term successor from § 9706(a) (3) was intended by Congress.[7]

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[4] Federal Defendant's Opposition to Eastern Enterprises' Motion for Summary Judgment on Statutory Interpretation Claims (Docket No. 48) at 16-20.

[5] *See* 26 U.S.C. § 9706(f) (6).

[6] *See* 26 U.S.C. § 9701(c) (2) (A) ("a related person shall also include a successor in interest"); 26 U.S.C. § 9706(b) (2) ("If a person becomes a successor of an assigned operator after the enactment date [of the Coal Act] . . .).

[7] *See Estate of Bell* v. *Commissioner, Internal Revenue Service*, 928 F.2d 901, 904 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section, but omits it in another); *United States* v. *Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991) ("In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."); *United States* v. *Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) ("Where Congress includes particular language in one section of

In addition, the decision not to include successors in § 9706(a) (3) is rational. It provides a comparatively simple way for the Social Security Administration to assign responsibility for a miner like East. It imposes a duty on the pre-1978 signatory operator, which is likely to be most familiar with the unique facts of its situation, to collect from anyone who may have agreed to assume its liability or is otherwise obligated to do so. Section, 9706(f) (6) makes clear that the Coal Act statute does not preempt or preclude such private rights of action. Section 9706(f) (6) expressly states that: "Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision of the Commissioner."

The Coal Act is silent with regard to who must be assigned beneficiaries if § 9706(a) (3) applies and the pre-1978 signatory operator who would otherwise be assigned the beneficiary is no longer in business. As plaintiff points out, the Social Security Administration has decided to assign such beneficiaries to the successors of pre-1978 signatory operators if such successors are now doing business. This provision, however, is of no assistance to Eastern Enterprises because it is not out of business.

If the Social Security Administration had promulgated a regulation imposing plaintiff's liability, as now defined by the Social Security Administration, on Eastern Enterprises' alleged successors, that regulation would appear to be vulnerable to

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a statute, but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in excluding the particular language.").

attack by successors, even under the deferential standard of *Chevron*.[8] *Chevron* provides that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [administrative interpretation] is based on a permissible construction of the statute."[9] However, "[t]he judiciary is the final authority on issues of statutory interpretation and must reject administrative constructions which are contrary to clear congressional intent."[10]

Two decisions concerning this court's sentencing of Raymond J. Patriarca suggest that ambiguity, like beauty, may be in the eye of the beholder.[11] In *Patriarca*, this court found that the United States Sentencing Commission guideline at issue was ambiguous.[12] The First Circuit found that it was clear.[13] On the pertinent point, the Coal Act is to this court more clear than the Sentencing Guideline was in *Patriarca*.

If, however, the statute were to be deemed ambiguous with regard to its application to East, this court finds that the

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[8] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

[9] *Id.* at 843.

[10] *Id.* at 843, n. 9.

[11] *Compare United States* v. *Patriarca*, 807 F.Supp. 165, 1889 (D. Mass. 1992) (Sentencing Guidelines are ambiguous regarding the meaning of the phrase "underlying racketeering activity" for the purpose of determining relevant conduct in a RICO case) *and United States* v. *Carrozza*, 4 F.3d 70, 79 (the application of the relevant conduct provision to the term "underlying racketeering activity" is "straightforward and unambiguous").

[12] 807 F.Supp. at 189.

[13] 4 F.3d at 79.

Social Security Administration's interpretation resulting in the assignment of East to the plaintiff, and leaving it to the plaintiff to impose liability on its alleged successors, is a reasonable construction of the statute deserving of deference under *Chevron*.[14]

The fact that the Social Security Administration has equivocated in its interpretation of the statute as it applies to Eastern Enterprises does not quality this conclusion. The Social Security Administration has now authoritatively determined that if a pre-1978 signatory operator is at present in business, it will assign beneficiaries similarly situated to East to that operator pursuant to § 9706(a) (3). This is a permissible and appropriate interpretation of the statute.

In addition, the Social Security Administration's assignment of beneficiaries in the USX/United Steel Mining Company and Guyan Eagle matters doe snot alter the analysis or result of plaintiff's motion for summary judgment. As noted earlier, see footnote 1, the USX and Guyan Eagle matters are not properly part of the record before this court for review.[15] More importantly, it appears that in those matters that assignments were made to successor companies only after the Social Security

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[14] *Chevron*, 467 U.S. at 843.

[15] The court recognizes that this observation may be inconsistent with the dicta in its decision in *Apex Construction Co.* v. *United States*, 719 F.Supp. 1144, 1147 n. 1 (D. Mass. 1989), to the effect that one possible grounds for obtaining discovery beyond the administrative record may be "discovery of the agency's contemporaneous construction of a particular term or regulation where the meaning is vague or ambiguous or where the construction used in the particular case appears inconsistent." It now appears that this court's observation, in dicta, may have been incorrect.

Administration's factual determinations that no otherwise assignable signatory operators or related persons remained in business. Thus, those cases are factually distinguishable from this case. The decisions in those cases were not made because the Social Security Administration used a different standard for making assignments.

Finally, addressing a point that was raised in plaintiff's memorandum, but not argued on February 1, 1996, this is not a case in which it is necessary to interpret an ambiguous statute to require assignment to plaintiff's alleged successor in order to avoid a grave and doubtful constitutional question.[16] First, as stated earlier, the statute is not ambiguous. If it is unconstitutional as written, the court should declare it unconstitutional. Second, at this point the statute does not appear to this court to be unconstitutional as applied to pre-1978 signatory operators, like the plaintiff in this case.[17]

In view of the foregoing, plaintiff's motion for summary judgment is hereby DENIED.

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[16] *See United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (where statutory language is truly ambiguous, "courts should construe statutes to avoid decision as to their constitutionality."); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trade Councils*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

[17] *See Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir. 1996) (rejecting constitutional challenges based on due process and takings clause claims).

II. Third Party Defendant Peabody's Motion to Dismiss

Peabody and its affiliates are third-party defendants, sued by Eastern Enterprises, which is a counterclaim-defendant with regard to allegations made by the United States mine Workers of America Combined Fund (the "UMWA Fund"). Peabody and its affiliates have moved to have Eastern's claim against them dismissed. The motion to dismiss is, however, without merit and is being denied, essentially for the reasons stated ion Eastern Enterprises' opposition memorandum.[18]

This court's jurisdiction over the third-party defendants is demonstrated by plaintiff's affidavits, which make a prima facie showing supported by specific verified facts.[19] Plaintiff's affidavits indicate that the sale of EACC to Peabody involved telephone calls to individuals in Boston, as well as meetings and negotiations held in Boston. This activity is sufficient to satisfy the Massachusetts Long Arm Statute's requirement that the cause of action arise out of the transacting of business in the Commonwealth.[20]

These actions also demonstrate that while purchasing EACC and Coal Properties Corporation, Peabody established the minimum contacts necessary to satisfy the constitutional

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[18] *See* Eastern Enterprises' Opposition to Third Party Defendants' Motion to Dismiss (Docket No. 20).

[19] Eastern Enterprises' Opposition to Third Party Defendants' Motion to Dismiss at Exh. A (Affidavit of Robert W. Weinig), Exh. B (Affidavit of Fred C. Raskin), Exh. C (Affidavit of Truman S. Casner) (Docket No. 20).

[20] *Ealing Corp.* v. *Harrods Ltd.*, 790 F.2d 978, 982-83 (1st Cir. 1986) (citing *Ross* v. *Ross*, 371 Mass. (1976)); M.G.L. ch. 223A § 3(a).

requirements of due process.[21] Requiring Peabody to appear in Massachusetts, rather than in New York, does not place an unfair burden upon the company and is more convenient for the plaintiff. In addition, maintaining the case in Massachusetts serves the interest of judicial efficiency since this court has substantially addressed the motion for declaratory judgment. Finally, it doe snot appear that the federal court in any other jurisdiction has a special interest in the substantive social policy involved that would justify transfer from this court. Considering these circumstances, it is fair to have the case proceed in Massachusetts.[22]

In its counterclaim against Eastern Enterprises, the UMWA Fund seeks a declaratory judgment rather than damages. However, this fact does not preclude the maintenance of a third-party action.[23] A third-party claim may be brought under Fed. R. Civ. P. 14(a) when the third party's liability is in some way dependent on the outcome of the main claim, or when the third-party is secondarily liable to the defendant. There is no express requirement that the main claim be for damages.[24] If the UMWA

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[21] *Id.* at 983-84.

[22] *See United Electrical, Radio and Machine Workers of America* v. *163 Pleasant Street Corp.*, 987 F.2d 39, 46 (1st Cir. 1993). This court is one of the permissible places in which this case may proceed. The question of a possible change of venue pursuant to 28 U.S.C. § 1404 is not now before the court.

[23] *See* Fed. R. Civ. 14(b) ("When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.").

[24] *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1446 at 355 (1990) (citing *Monarch Life Ins. Co.* v. *Donahue*, 702 F.Supp. 1195 (D.C. Pa. 1989); *Prudential Insur. Co. of America* v. *BMC*

Fund prevails in this case, Eastern Enterprises will, as a practical matter, be liable for an amount estimated to be one hundred million dollars. Eastern Enterprises seeks in its third-party action to impose this liability on the third-party defendants. This is permissible.

Finally, Eastern Enterprises has stated a claim on which relief can be granted. For their motion to dismiss to be granted, the third-party defendants would have to show there is clearly no set of facts on which Eastern Enterprises is entitled to relief.[25] Eastern Enterprises' allegation that all liability regarding its mining operations was assumed, first by EACC and then by Peabody, when it bought the stock of EACC, is sufficient to state a claim on which relief may be granted.[26]

Accordingly, the motion to dismiss the third-party complaint is hereby DENIED.

/s/ Mark L. Wolf

UNITED STATES DISTRICT COURT

Industries, Inc., 113 F.R.D. 102, 103 (D.C.N.Y. 1986)).

[25] "In considering a motion to dismiss [under Fed. R. Civ. P. 12(b)(6)], a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs." *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957)).

[26] At the February 1, 1996 hearing, Peabody suggested that it may have some unique legal defenses to the third-party complaint. The merits of any such defenses have neither been presented nor decided in the pending motion to dismiss.

COAL INDUSTRY RETIREE HEALTH BENEFITS ACT OF 1992, PUB. L. NO. 102-486, 106 STAT. 3037

SEC. 19142. FINDINGS AND DECLARATION OF POLICY.

(a) FINDINGS. — The Congress finds that — . . .

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

SELECTED SECTIONS OF THE UNITED STATES CODE, TITLE 26, SUBTITLE J

§ 9701 Definitions of general applicability

(a) Plans and funds. — For purposes of this chapter —

(1) UMWA Benefit Plan. —

(A) In general. — The term "UMWA Benefit Plan" means a plan —

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan. — The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is

substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan. — The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan. — The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

(3) 1974 UMWA Pension Plan. — The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan. — The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined fund. — The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements. — For purposes of this section —

(1) Coal wage agreement. — The term "coal wage agreement" means —

(A) The National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

(2) Settlors. — The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement. — The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators. — For purposes of this section —

(1) Signatory operator. — The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons. —

(A) In general. — A person shall be considered to be a related person to a signatory operator if that person is —

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. — The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator. — The term "1988 agreement operator" means —

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator. — The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator. — The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries. — For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the

signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

(7) Business. — For purposes of this chapter, a person shall be considered to be in business if such person conducts of derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date. — For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

§ 9702 Establishment of the United Mine Workers of America Combined Benefit Fund

(a) Establishment. —

(1) In general. — As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans. — As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

(3) Treatment of plan. — The Combined Fund shall be —

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(4) Tax treatment. — For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) Board of trustees. —

(1) In general. — For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designed by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

(2) Successor trustees. — Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

(3) Special rules. —

(A) BCOA. — If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

(B) Former signatories. — The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

(c) Plan year. — The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

§ 9703 Plan benefits

(a) In general. — Each eligible beneficiary of the Combined Fund shall receive —

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits. —

(1) In general. — The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates. —

(A) In general. — The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which —

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium

payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions. — The amount determined under subparagraph (A)(ii) for any plan year shall be reduced —

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases. — The amount determined under subparagraph (A)(ii) shall be increased —

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which —

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers. — The trustees of the Combined Fund shall not enter into an agreement

under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date. — Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage. —

(1) In general. — The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage. — The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration. — The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(e) Limitation on enrollment. — The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary. — For purposes of this subchapter, the term "eligible beneficiary" means an individual who —

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

§ 9704 Liability of assigned operators

(a) Annual premiums. — Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums —

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium. — For purposes of this chapter —

(1) In general. — The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium. — The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of —

(A) the amount determined by dividing —

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for medicare reductions. — If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be

reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) **Death benefit premium.** — The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) **Unassigned beneficiaries premium.** — The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) **Premium accounts; adjustments.** —

(1) **Accounts.** — The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) **Allocations.** —

(A) **Administrative expenses.** — Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative

costs) from such accounts during the preceding plan year.

(B) **Interest.** — Interest shall be allocated to the account established for health benefit premiums.

(3) **Shortfalls and surpluses.** —

(A) **In general.** — Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) **Exception.** — Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to —

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) **No authority for increased payments.** — Nothing in this paragraph shall be construed to allow expenditures for health care benefits for

any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage. — For purposes of this section —

(1) In general. — The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments. — In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums. —

(1) In general. — The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility. — Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information. — The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

(i) Transition rules. —

(1) 1988 Agreement operators. —

(A) 1st year costs. — During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans. — During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure. — If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions. —

(i) 1st year payments. — In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments. — In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in

connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation. — Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years. — Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds. — Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year. — In the case of the plan year of the Combined Fund beginning February 1, 1993 —

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs. — The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

§ 9706 Assignment of eligible beneficiaries

(a) In general. — For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which —

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which —

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. — For purposes of subsection (a) —

(1) Aggregation rules. —

(A) Related person. — Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded. — Employment with —

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

(2) Reassignment upon purchase. — If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such a successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such

assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

(c) **Identification of eligible beneficiaries.** — The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) **Cooperation by other agencies and persons.** —

(1) **Cooperation**. — The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

(2) **Providing of information** —

(A) **In general.** — Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security

in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

(B) **Limitation.** — Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

(3) **Trustees.** — The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) **Notice by Commissioner.** —

(1) **Notice to fund.** — The Commissioner of Social Security shall advise the trustees of the Combined

Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) Other notice. — The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

(f) Reconsideration by Commissioner. —

(1) In general. — Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review. — An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review. —

(A) Error. — If the Commissioner of Security Social determines under a review under paragraph (2) than an assignment was in error —

(i) the Commissioner shall notify the assigned operator and the trustees of the

Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

(B) No error. — If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

(4) Determinations. — Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

(5) Payment pending review. — An assigned operator shall pay the premiums under section 9704 pending review by the Commissioner of Social Security or by a court under this subsection.

(6) Private actions. — Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

(g) Confidentiality of information. — Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable

to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

Supreme Court, U.S.
FILED
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No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1996

EASTERN ENTERPRISES, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WALTER E. DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

29 pp

QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment as applied to petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-42

EASTERN ENTERPRISES, PETITIONER

v.

SHIRLEY S. CHATER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 110 F.3d 150. The opinion of the district court granting summary judgment in favor of respondents (Pet. App. A25-A27) is unreported. An earlier opinion of the district court denying petitioner's motion for summary judgment and denying third-party defendant Peabody Holding Company's motion to dismiss (Pet. App. A28-A38) is reported at 942 F. Supp. 684.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1997. The petition for a writ of certiorari was filed on July 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701-9722 (Coal Act or Act), was enacted in response to a crisis in health care costs in the coal industry. The Act has origins in a series of collective bargaining agreements between coal mine operators and the United Mine Workers of America (UMWA). Those contracts, known as National Bituminous Coal Wage Agreements (NBCWAs), created multi-employer benefit plans that provided health care benefits to active and retired miners and to their dependents. See Pet. App. A3.

The health care benefits of coal miners, their dependents, and their survivors have for many years been a central issue in labor relations in the coal industry. In 1946, the federal government nationalized the coal industry in response to a UMWA strike over health and retirement benefits. The government and the UMWA subsequently negotiated a contract (the Krug-Lewis Agreement) that, among other things, established employer-sponsored health and retirement programs. In 1947, after the mines were returned to private control, the UMWA and the Bituminous Coal Operators Association (BCOA) entered into the first NBCWA, which created a multi-employer health and welfare fund. Pet. App. A3.

In 1950, a successor NBCWA established that, in exchange for union acquiescence in the mechanization of the mines, signatory operators would create a

new welfare and retirement fund (the 1950 W&R Fund) financed by a per-ton levy on coal mined by the operators. Pet. App. A3. The 1950 NBCWA provided the basic benefits format for wage agreements until 1974, when demographic changes and the passage of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, required a restructuring of the health and retirement benefits fund. In response to ERISA's new funding requirements for pension plans, the 1974 NBCWA divided the 1950 W&R Fund into four "trusts," two of which—known as the 1950 Benefit Trust and the 1974 Benefit Trust—financed health care benefits.[1] The 1950 Trust provided health care benefits to miners retiring before 1976, and to their dependents; the 1974 Trust provided benefits to miners retiring after 1976, to their dependents, and to active miners. The 1974 NBCWA expressly promised that covered retired miners would retain health benefits for life. Pet. App. A4.

The 1978 NBCWA included provisions that, *inter alia*, assured health care for "orphaned" miners, *i.e.*, retired miners whose last employer had gone out of business or otherwise ceased contributing to the trusts. It also obligated signatories to make sufficient contributions to maintain benefits due under the 1950 and 1974 plans (the "guarant[ee]" clause) and to continue to contribute as long as the operator remained in business (the "evergreen" clause). Further, the 1978 NBCWA shifted responsibility for active miners and miners who retired after 1975 to single employer plans maintained by the individual companies. See

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[1] The other two trusts, which covered pension benefits for miners, are not at issue in this case.

Coal Commission Report: A Report to the Secretary of Labor and the American People 26 (Nov. 1990) (*Coal Commission Report*).

The provisions in the 1978 agreement for "orphaned" retirees, in combination with larger demographic and economic forces, seriously impaired the financial stability of the multi-employer health benefit funds. The cost of health care rose steeply throughout the 1980s, and the number of orphaned miners increased as employers left the industry or otherwise ceased contributing to the funds. By 1990, the 1950 and 1974 UMWA Benefit Plans had incurred a deficit of more than $100 million, and their funding bases were declining faster than their respective beneficiary populations. *Coal Commission Report* at 43-44.

2. After an 11-month strike at the Pittston Coal Company in which health benefits were a major issue, the Secretary of Labor established the Advisory Commission on Mine Workers Retiree Health Benefits (the Coal Commission), which was charged with assessing the financial prospects of the 1950 and 1974 UMWA health benefit plans and formulating recommendations to assure the health plans' long-term viability. The Coal Commission proposed two possible solutions: an industry-wide funding plan taxing all current coal operators, and a more limited arrangement funded by past and present NBCWA signatories. *Coal Commission Report* at viii, 60-65.

After extensive hearings held to consider the Coal Commission's recommendations and other proposals to remedy the health care crisis in the coal industry, Congress enacted the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, 106 Stat. 3036 (now codified at 26 U.S.C.

9701-9722), as a comprehensive response to the problem of coal miners' medical costs. The Coal Act was intended "to remedy problems with the provision and funding of health care benefits * * * to the beneficiaries of [coal industry] multi-employer benefit plans," to ensure "sufficient operating assets" for such plans, and "to provide for the continuation of a privately financed self-sufficient program" for delivering health care to the plan beneficiaries. Coal Act § 19142(b)(1)(B), 106 Stat. 3037. Congress found that, to ensure the proper functioning of interstate commerce, the coal industry's existing system for funding retiree health benefits should be modified "to identify persons most responsible for plan liabilities." Coal Act § 19142(a)(2), 106 Stat. 3037.

To achieve these purposes, the Coal Act comprehensively restructured the provision of health benefits to retired miners by, among other things, merging the 1950 and 1974 UMWA Benefit Plans into a new multi-employer plan known as the United Mine Workers of America Combined Fund (Combined Fund). 26 U.S.C. 9702(a)(1)-(2).[2] As is relevant here, the Combined Fund is required to provide "substantially the same" health benefits as were available under the 1950 and 1974 Benefit Trusts to retirees and their dependents who were "eligible to receive, and receiving" benefits from the trusts as of July 20, 1992. See 26 U.S.C. 9703(a)-(f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

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[2] The Coal Act also established another fund, the 1992 UMWA Benefit Plan, which is not at issue here. See 26 U.S.C. 9712.

Benefits paid through the Combined Fund are financed through annual premiums. Those premiums must be paid by "signatory [coal] operators," *i.e.*, coal operators that either signed a national coal wage agreement between the UMWA and the BCOA or made contributions to the 1950 and 1974 Trusts under related "me-too" wage agreements. See 26 U.S.C. 9701(b)(1) and (3), 9701(c)(1). The Coal Act bases the amount of premiums on the principles that each signatory operator should bear the cost of providing benefits to its own retirees, if possible, and that all signatories should share proportionally in the industry-wide cost of providing benefits to orphaned retirees whose former employers had gone out of business entirely. As is pertinent to this case, premium obligations may be imposed on any signatory operator that "remains in business," 26 U.S.C. 9706(a), with "business" defined by the Act to include "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry," 26 U.S.C. 9701(c)(7). The premium obligations of a signatory coal operator that has ceased all business activity may, in turn, be imposed on a "related person" to the signatory operator (such as a corporate affiliate or individual partner)[3] that "remains in business" within the meaning of the Act. 26 U.S.C. 9706(a).

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[3] The term "related person" includes "a member of a controlled group of corporations * * * which includes such signatory operator"; "a trade or business which is under common control * * * with such signatory operator"; anyone with "a partnership interest or joint venture with a signatory operator" that employed eligible beneficiaries; and "a successor in interest of" any of the above. 26 U.S.C. 9701(c)(2)(A).

The Coal Act directs the Commissioner of Social Security to match beneficiaries of the Combined Fund with the signatory operator responsible for paying their health care benefits. 26 U.S.C. 9706(a). The Act sets forth a three-tiered formula for matching miners to coal operators, which attempts to place primary responsibility for financing health care benefits on those signatory operators that signed NBCWAs in 1978 or afterwards. The Commissioner is first directed to assign a miner to the coal operator that signed a national wage agreement in 1978 or later and that most recently employed the miner for at least two years. 26 U.S.C. 9706(a)(1). If no operator meets both criteria, then the miner is assigned to the operator that signed a national wage agreement in 1978 or later and that most recently employed the miner. 26 U.S.C. 9706(a)(2). Finally, if none of the miner's surviving employers signed a national wage agreement in or after 1978, then the miner is assigned to the pre-1978 signatory who employed him for the longest period before 1978. 26 U.S.C. 9706(a)(3).

3. Petitioner mined coal in West Virginia, Pennsylvania, and Kentucky from 1946 to 1965, and was a signatory to the national wage agreements during that period. Pet. App. A6. At the end of 1965, petitioner transferred its coal operations to a wholly owned subsidiary, Eastern Associated Coal Corporation (EACC). *Id.* at A6-A7. EACC was a signatory to all subsequent national wage agreements including the 1974, 1978, and 1988 agreements that guaranteed lifetime benefits to all eligible miners and dependents. *Id.* at A7. In 1987, petitioner sold EACC to Peabody Holding Company. *Ibid.*

The Commissioner of Social Security assigned to petitioner premium responsibilities for more than

1000 miners who had worked for the company before 1966, based on petitioner's status under the Coal Act as the pre-1978 signatory operator for whom the assigned miners had worked for the longest period. Petitioner filed suit in district court, alleging that the Coal Act, as applied to it, violates the Due Process Clause and Just Compensation Clause of the Fifth Amendment, and also challenging on statutory grounds the Commissioner's interpretation of the Coal Act to require it to pay for those miners' benefits. The district court upheld the Commissioner's interpretation of the Coal Act, Pet. App. A29-A35, and also upheld the constitutionality of the Act's funding obligations under the Due Process Clause and the Just Compensation Clause, *id.* at A25-A27.

4. The court of appeals affirmed. Pet. App. A1-A23.[4] Addressing first petitioner's due process challenge to the Coal Act, the court stressed that the Act is "entitled to the most deferential level of judicial scrutiny," and that, "[w]here, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted 'in an arbitrary and irrational way.'" *Id.* at A10 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). The court also observed that, even though the Coal Act imposes retroactive liability on companies like petitioner, the statute is nonetheless subject to review only under the rational basis standard. *Id.* at A11-A12. "As long as 'the retroactive application of a statute is

[4] The court of appeals upheld the Commissioner's interpretation of the Coal Act as supported by the plain language of the statute. Pet. App. A7-A9. In this Court, petitioner has not challenged the Commissioner's construction of the Act.

supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.'" *Ibid.* (quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)).

Applying that rational-basis standard, the court upheld the application of the Coal Act to petitioner. The court first held that Congress's purpose in enacting the Coal Act—to resolve persistent problems of labor unrest by ensuring that multi-employer coal retiree benefit plans were adequately funded—was legitimate. Pet. App. A12. The court then rejected petitioner's argument that the statute irrationally assigns miners to companies, such as petitioner, that left the coal industry before 1974 and did not expressly obligate themselves in later NBCWAs to provide lifetime health benefits. *Id.* at A12-A13. The court stressed that petitioner, by signing the pre-1974 NBCWAs, had contributed to miners' legitimate expectations of lifetime health benefits. *Id.* at A13. The court also noted that the statute "actually takes some pains to shield companies like [petitioner]," which ceased coal mining operations before 1974, from disproportionate liability, by directing the assignment of retired miners first to any nondefunct coal mining company that employed them after 1978. *Id.* at A15. And it observed that the Coal Act's system is in many respects more rational than an alternative scheme suggested by petitioner, which would impose all the costs of retired miners' health care on post-1974 coal operators, because such a scheme would require that the health benefits of many retired

miners be paid by companies that had never employed them. *Id.* at A16 n.5.[5]

The court analyzed petitioner's taking claim by applying the three factors identified by this Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), as having "particular significance" to such a claim: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation [has] interfere[d] with * * * distinct investment-backed expectations, and (3) the [character] of the governmental action." Pet. App. A20 (internal quotation marks omitted).

As for the economic impact of the Coal Act on petitioner, the court first noted that the Act "does not involve the total deprivation of an asset." Pet. App. A20. The court then concluded that the Act's impact on petitioner "reflects a sufficient degree of proportionality" because petitioner will be assigned to pay for miners' medical benefits only when no post-1978 NBCWA signatory can be found, and because petitioner will be liable only for those individuals "whom it employed for a relevant (and relatively long) period of time." *Id.* at A20-A21. With regard to the second *Connolly* factor, interference with petitioner's reasonable investment-backed expectations, the court rejected petitioner's argument that it could have had

[5] The court also rejected petitioner's reliance on *Railroad Retirement Board* v. *Alton Railroad*, 295 U.S. 330, 348-350 (1935), which struck down, under the Due Process Clause, the retroactive application of the compulsory retirement benefit system established by the Railroad Retirement Act, ch. 896, 48 Stat. 1283. The court found *Alton* distinguishable on its facts, but also stated that "*Alton* belongs to an earlier, now discredited doctrinal era, and it is no longer good law." Pet. App. A16.

no expectation that it would be made liable for its retirees' health benefits. Pet. App. A22. In light of the pattern of federal intervention in (and regulation of) the coal industry and petitioner's own role in fostering miners' expectation of lifetime benefits, the court reasoned, petitioner "had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation [of lifetime health benefits] engendered." *Ibid.*

The court further found that the nature of the governmental action under the Coal Act lends support for the Act's constitutionality. Pet. App. A22-A23. The Act, noted the court, does not require the physical invasion or permanent appropriation of petitioner's property, but rather "adjusts the benefits and burdens of economic life to promote the common good." See *id.* at A22. Further, the funds collected are disbursed to a private benefit fund (the Combined Fund), not a government entity. *Id.* at A23. Thus, the court concluded, "there is no basis whatever for [petitioner's claim] that the statute transgresses the Takings Clause." *Ibid.*

ARGUMENT

The decision of the court of appeals is the latest in a series of unanimous appellate decisions rejecting challenges to the constitutionality of the funding mechanisms of the Coal Act. See *Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688, 793-795 (3d Cir. 1996); *In re Chateaugay Corp.*, 53 F.3d 478, 494-496 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1127-1130 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516, 521-526 (6th Cir. 1996), cert. denied,

117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832 (6th Cir.), cert. denied, 116 S. Ct. 64 (1995). In each of those cases in which review by this Court was sought, the Court has declined review. There is no reason for a different result in this case.

1. Petitioner argues (Pet. 12-21) that the Coal Act violates due process insofar as it requires coal mine operators who left the business of mining coal before 1974 to pay for the health care benefits of their retired employees. Petitioner argues that the Coal Act irrationally imposes retroactive liability on operators, such as petitioner, that left the industry before lifetime benefits were promised and (petitioner contends) did not contribute to the financial crisis in the benefit funds. Pet. 15-17.

As the court of appeals recognized, the Coal Act "come[s] to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As long as a "statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Moreover, "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Ibid.* Even when a statute has retroactive effect, the Due Process Clause is satisfied as long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

The funding provisions of the Coal Act, including the imposition of premium obligations on pre-1974 signatory operators such as petitioner, satisfy the standards of rational basis review. The Coal Act's objective—resolution of the financial crisis in the health care system for coal miners—is plainly legitimate. Congress knew, from long experience of labor relations in the coal industry from the federal takeover of the coal mines in the 1940s through the Pittston strike of the 1980s, that the crisis in health care benefits threatened to deprive thousands of retired coal miners and their dependents of their health benefits, and also threatened seriously to disrupt interstate commerce. See Coal Act § 19142(b), 106 Stat. 3037. Given the importance of coal production to the national economy and the prospect that those problems could lead to further labor unrest and inflict economic harm on coal operators and retired miners, the Coal Act plainly advances a legitimate government purpose.

As for the means by which Congress accomplished that objective, Congress had at hand several options for allocating the cost of financing the Combined Fund. It could have restricted the financing obligation to signatories of the then-current NBCWA. Alternatively, Congress could have chosen to impose a tax on the coal industry as a whole, or paid for the benefits out of general revenues. It also had a number of intermediate options, each of which would have required line-drawing. It could, for example, have drawn the line at the 1978 NBCWA, which created the "guarantee" and "evergreen" clauses; at the 1974 NBCWA, which established the 1950 and 1974 Trusts and first expressly guaranteed miners certain life-

time benefits; at the 1950 NBCWA, which created the immediate predecessor of those trusts; or some other point.

Each of those classifications would have been justifiable as a response to the financial crisis in the health care system for miners; each also might have had certain drawbacks in ensuring adequate financing of the health care system for miners. Petitioner argues that when Congress decided to include pre-1974 NBCWA signatories in the funding mechanism, it drew the line at the wrong place. But that kind of line-drawing exercise is a quintessentially legislative task, and "there is no need for mathematical precision in the fit between [the] justification and means" chosen by the legislature. *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 639 (1993).

Congress acted rationally in requiring pre-1974 signatory operators to contribute to the Combined Fund. Every such operator previously employed miners who were entitled to receive retirement health benefits from the 1950 and 1974 trusts. Those trusts were multi-employer trusts; miners received their entitlement to health care benefits based on portable service credits from operators who signed one of the NBCWAs in effect since 1950. Moreover, those trusts provided "comprehensive health care benefits for retired miners and their families" for 45 years, *Coal Commission Report* at vii, and retired miners had "legitimate expectations of health care benefits for life" from the trusts, *id.* at 1. As the Sixth Circuit observed in rejecting the same challenge, all of those miner operators "directly contributed to the Combined Fund's liabilities by providing service credits to [their] former employees." *Blue Diamond Coal*, 79

F.3d at 523. It was therefore proper for Congress to require all the coal operators who had contributed to the liabilities of the benefit funds to pay some of the cost of restoring the financial stability of the health care system. See *Concrete Pipe*, 508 U.S. at 637-638.

In addition, all signatory operators, including those (like petitioner) that had left the business of coal mining, benefitted substantially from participation in the multi-employer benefit system that was established in the 1940s and was facing a crisis in the early 1990s. First, they plainly benefitted from their own miners' labor. See 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) ("technical explanation" of 1992 Coal Act introduced by Sen. Wallop) (Coal Act assigns financial responsibility to "those companies which employed the retirees in question, and thereby benefitted from their services"). Moreover, all signatory operators benefitted from the ease of movement of miners and the labor peace throughout the industry to which those multi-employer trusts (with their portable service credits) significantly contributed. As the court of appeals observed in this case (Pet. App. A13-A14), coal operators extracted "substantial concessions" from the miners over the years in return for "the implicit commitment to assure lifetime health benefits," including the workers' acquiescence in the automation of the mines. See also *Blue Diamond Coal*, 79 F.3d at 524; cf. *Concrete Pipe*, 508 U.S. at 638-639. Congress therefore reasonably concluded that all signatory operators should be held financially responsible for making good on the "moral obligation to the [miners] and retirees" to contribute towards the cost of their health care. See *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Congress also rationally concluded that inclusion of pre-1974 signatory operators in the Coal Act's financing scheme was necessary to secure adequate funding for the health of retired coal miners and their dependents. Financial and actuarial figures presented at 1991 Senate hearings called into question the feasibility of limiting the so-called "reachback" provision to 1978 and later NBCWA signatories. A more limited reachback provision could well have left a significant number of beneficiaries of the 1950 UMWA Benefit Trust "orphaned." See Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 24-27 (Comm. Print 1993); 138 Cong. Rec. H11,413 (daily ed. Oct. 5, 1992) (Rep. Rahall) (noting that "75 percent of the retirees served by the [UMWA] health funds never worked for, or had any connection with, a currently contributing company"). Given that possibility, it was "surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

Petitioner argues that, because it left the industry in 1966 and created a subsidiary that assumed its premium obligations, it is not responsible for the problems addressed by the Coal Act, because it did not fail to live up to express contractual obligations in the NBCWAs to provide miners with lifetime benefits. Pet. 16-18. But as we explain above (p. 7, *supra*), the Coal Act takes account of differences in responsibility for the fiscal crisis by placing the primary financial burden on operators that signed the 1978 NBCWA and subsequent wage agreements. An operator that did not sign the 1978 NBCWA may be

assigned a retired miner only if no other existing operator that employed that miner signed the 1978 NBCWA, and only if the operator employed the miner for a longer period than any other signatory operator. See 26 U.S.C. 9706(a)(3). Signatory operators like petitioner are the operators of last resort for retired miners who would otherwise be "orphaned"; if those operators were not required to contribute, the costs of health care for their orphans would have to be borne by a smaller group of operators—exactly the situation that led to the crisis that precipitated enactment of the Coal Act.[6]

Moreover, as the court of appeals pointed out (Pet. App. A16 n.5), petitioner's contention, if accepted, would shift the cost of paying the health benefits of petitioner's former employees to other operators who had never employed those miners. In any event, "[i]t is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader [or, here, narrower] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19.[7] See also *Holland*,

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[6] Petitioner's former subsidiary, EACC, was a signatory to wage agreements after 1966, and therefore has funding obligations for the miners that it employed. To the extent that petitioner contracted with EACC to meet petitioner's future obligations to its retirees, petitioner remains free to seek indemnification under 26 U.S.C. 9706(f)(6), an option that petitioner is pursuing in this case.

[7] Petitioner argues that the court of appeals erred in declining to follow this Court's decision in *Railroad Retirement Board* v. *Alton Railroad*, 295 U.S. 330 (1935). But as the court of appeals noted (Pet. App. A16 n.6), even if the *Alton* decision

102 F.3d at 741 ("[L]egislation need not place remedial burdens on the 'most responsible' party to survive rational basis scrutiny.").

2. Petitioner also argues (Pet. 21-30) that the Coal Act effects an uncompensated taking of its property in violation of the Just Compensation Clause. The court of appeals—like every other appellate court that has addressed the question—correctly determined that there is no "taking" in this case. This Court has identified "three factors with particular significance" for assessing whether a governmental regulation effects an uncompensated taking of property. See *Concrete Pipe*, 508 U.S. at 643. The Court considers the economic impact of the regulation on the claimant, the extent to which the regulation interferes with "reasonable investment-backed expectations," and the nature of the governmental action. *Id.* at 645; *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226 (1986). Those factors lead to the conclusion that the Coal Act is not a taking.[8]

Petitioner argues (Pet. 24-25) that the Coal Act interferes with its expectations, when it left the coal

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itself is "still zoetic," it is readily distinguishable from this case. The difficulty in *Alton* was that some of the railroad companies were required to finance pensions "upon the basis of transactions with which the [railroads] were never connected." 295 U.S. at 350. By contrast, the Coal Act "links operator liability to previous employment relationships by assigning beneficiaries to their former employers where possible." *Chateaugay*, 53 F.3d at 489.

[8] Petitioner argues (Pet. 22) that the court of appeals erroneously merged the due process and taking analyses in this case. The court of appeals' opinion, however, plainly treats the two inquiries as separate, and the court faithfully applied the three factors identified by this Court as relevant to a taking inquiry. See Pet. App. A19-A23.

industry, that EACC would assume any future liability for premiums, and that its contractual obligations under the wage agreements would end when the wage agreements terminated. *Connolly*, however, rejected a similar contention. There, employers that had withdrawn from a multi-employer pension plan when such withdrawal was fully free from liability contended that the subsequent, retroactive imposition of withdrawal liability by Congress upset their reasonable expectations. The Court concluded that, because pension plans had long been the objects of legislative concern even before the enactment of ERISA, prudent employers had more than sufficient notice before enactment of the withdrawal liability provisions that withdrawal might trigger future financial obligations. 475 U.S. at 227.

Here, too, the long history of federal involvement in the coal industry (and particularly in the issue of health benefits for coal miners) belies the notion that pre-1974 NBCWA signatories could have reasonably expected future immunity from further contribution towards the costs of retired employees' health benefits, especially in the face of the instability and fiscal crisis that led to enactment of the Coal Act. As early as 1946, when the government nationalized the coal mines and negotiated the Krug-Lewis Agreement, it was clear both that the stability of the coal industry demanded adequate employee health and welfare benefits, and that the Federal Government was prepared to intervene to ensure the availability of those benefits. The first multi-employer welfare and retirement fund, set up by the 1946 Krug-Lewis Agreement, was managed by three trustees, one of whom was appointed by the Federal Government. *Coal Commis-*

sion Report 18-19.[9] From that point on, the federal government's involvement in establishing the health care delivery system for retired miners was extensive. *Id.* at 21, 22, 23, 27-28. Thus, signatory operators that ceased to contribute to the industry's multiemployer health benefit program could hardly have expected that they would escape all financial responsibility in the event of further federal intervention on behalf of their former employees.

Although petitioner stresses the absence of any statutory obligation to provide benefits in existence at the time that it was a signatory to a national wage agreement (Pet. 25), this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), demonstrates that this argument lacks merit. *Monsanto* held that the Environmental Protection Agency's pre-1972 disclosure of trade secrets submitted to the agency under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not constitute a "taking." *Id.* at 1008-1010. The Court recognized that, during the period in question, "neither FIFRA nor any other provision of law gave EPA authority to disclose data obtained from Monsanto," but it explained that, "[i]n an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of * * * [pesticide data], upon focusing on the issue, would find disclosure to be in

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[9] Indeed, the Coal Commission noted that the multiemployer funds providing health care benefits to retired miners were created "in the White House in a contract between the federal government and the UMWA." *Coal Commission Report* vii.

the public interest." *Id.* at 1008-1009. In an industry that has been the focus of as much public concern and governmental regulation as the coal industry, the possibility was surely substantial as early as the 1950s that the Federal Government would, upon focusing on the issue, find compulsory employer funding of retired miners' health benefits to be necessary to the proper functioning of interstate commerce.[10]

Petitioner also argues that the liability imposed by the Coal Act is out of proportion to its experience with the prior benefit funds, because petitioner fulfilled its financial commitment to the miners through EACC and did not contribute to the financial crisis that necessitated enactment of the Coal Act. Pet. 28. These arguments have been soundly and uniformly rejected by the courts. See, *e.g.*, *Davon*, 75 F.3d at 1124-1125; *Lindsey Coal Mining Co.*, 90 F.3d at 694; *In re Blue Diamond Coal Co.*, 79 F.3d at 522-523. As the court of appeals in this case noted, petitioner is assigned funding obligations for miners that petitioner employed only in those situations where no post-1977 NBCWA signatory can be found. Pet. App. A21. Petitioner's liability for premiums under the Coal Act is therefore tailored to its previous employment history with miners who will be receiving health care benefits under the Act.

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[10] Although petitioner relies on *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951), to argue that past federal intervention in the coal industry has resulted in successful takings claims (Pet. 25 n.10), that case involved a five-month government takeover of coal mines to avert a nationwide strike during World War II, an appropriation of physical property that cannot credibly be compared with the assessments imposed by the Coal Act.

Although petitioner argues that the Court's takings jurisprudence requires that the Coal Act have "average reciprocity of advantage," Pet. 28 n.12, there is no such requirement. While the existence of "average reciprocity of advantage" may lead to the conclusion that no uncompensated taking has occurred (see *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987)), "the Just Compensation Clause 'has never been read to require the * * * courts to calculate whether a specific individual has suffered burdens * * * in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.21 (1987)).

Finally, petitioner takes issue (Pet. 29) with the First Circuit's conclusion (Pet. App. A23) that the Coal Act—like the provisions of the Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. 1381-1461, upheld by this Court in *Gray*, *Connolly*, and *Concrete Pipe*—"is merely a public program that readjusts economic burdens." Petitioner argues (Pet. 29) that the Coal Act is distinguished from the MPPAA because the scope of the Coal Act's retroactivity is greater, and because the Coal Act imposes liability on companies that did not threaten the financial stability of the funds. That argument is wide of the mark. The crucial aspect of the governmental regulation at issue here is that the government has not physically invaded or permanently appropriated anyone's assets, but has merely assigned a financial liability to the employer based on particular relationships in the past. Cf. *Concrete Pipe*, 508 U.S. at 643. The Court has been much less willing to find a taking when the challenged government regulation merely imposes financial liability on an employer. Thus,

petitioner's attempt to "shoehorn" (*ibid.*) its argument into a taking claim by relying on the nature of the governmental action must fail.

The fundamental question under the Just Compensation Clause is whether Congress is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227. There is no such unfairness here. It was eminently reasonable for Congress to conclude that NBCWA signatories as a class bear a collective responsibility, and one grater than that of the public as a whole, for the health care of retired coal miners and their dependents. Coal operators such as petitioner benefitted specially from the labor of those miners as well as from the multiemployer health care system established to benefit the entire coal industry. Under those circumstances, "fairness and justice" do not require the public at large to assume the costs of the Combined Fund, nor do they entitle petitioner to immunity from sharing in those costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER E. DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SUSHMA SONI
Attorneys

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No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,
v.
JOHN J. CALLAHAN,
ACTING COMM'R OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

JOHN R. MOONEY
MOONEY, GREEN, BAKER GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

PETER BUSCEMI
Counsel of Record
DAVID LUBITZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 467-7190

Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

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QUESTION PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, Congress determined that each employer that voluntarily participated in the collective bargained multiemployer health care system for active and retired miners in the coal industry and whose former employees were still receiving benefits from that system should, beginning on February 1, 1993, pay the future health care costs of the retired employees and dependents assigned to that employer by the Commissioner of Social Security under the criteria set forth in the statute.

The question presented is whether the Coal Act, as applied to petitioner, violates the Due Process and Takings Clauses of the Fifth Amendment.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were the UMWA Combined Benefit Fund and its trustees, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carlton R. Sickles, Gail R. Wilensky, Michael H. Holland, and William P. Hobgood, and Peabody Holding Company, Eastern Associated Coal Corp., and Coal Properties Corp. All of these parties are respondents in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-42

EASTERN ENTERPRISES,
Petitioner,

v.

JOHN J. CALLAHAN,
ACTING COMM'R OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-23) is reported at 100 F.3d 150. The district court's judgment and order (Pet. App. A-24 to A-27) are not reported. An earlier opinion by the district court (Pet. App. A-28 to A-38) is reported at 942 F. Supp. 684.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056. The Coal Act added a new Subtitle J, "Coal Industry Health Benefits," to the Internal Revenue Code. Subtitle J is codified at 26 U.S.C. §§ 9701-9722. (For convenience, we refer to these new Internal Revenue Code provisions simply as sections of the Coal Act.) The statute also amended the Surface Mining Control and

Reclamation Act of 1977 (the "Surface Mining Act"). The Surface Mining Act amendments, 106 Stat. 3056, are codified in principal part at 30 U.S.C. § 1232(h).

The petition does not reproduce the statute in full. It omits all but one of the prefatory provisions of the Coal Act, which set forth Congress's findings and declarations of policy. It also omits 26 U.S.C. § 9705, which provides hundreds of millions of dollars for retiree health care from sources other than retirees' former employers, thus reducing the financial burden on companies like petitioner. Finally, the petition omits all sections of the Coal Act after 26 U.S.C. § 9706. Accordingly, the entire statute, as it appears in the Statutes at Large, is reproduced in the appendix to this brief.[1]

STATEMENT OF THE CASE

The petition presents an incomplete and misleading account of the origins of the Coal Act, the problem that Congress sought to address, the nature of the legislative solution, and the rationale for the congressional action. It also attempts to minimize petitioner's own involvement with the collectively bargained multiemployer health care system that provided benefits to coal miners and their families for more than 40 years prior to the enactment of the Coal Act.

In particular, petitioner Eastern Enterprises ("Eastern") seeks to minimize the facts that as a signatory to several collective bargaining agreements and amendments, it participated in its own name in the UMWA Health and Retirement Funds for nearly 20 years, and thereafter participated in those Funds for more than another 20 years, as

[1] Effective March 31, 1995, Congress transferred the Secretary's duties under the Coal Act to the Commissioner of Social Security ("Commissioner"). *See* 26 U.S.C. §§ 9704, 9706 (historical notes); Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9), 108 Stat. 1472, 1487-88 (1994). Accordingly, the Commissioner has been substituted for the Secretary in this case.

the parent and direct financial beneficiary of its wholly-owned subsidiary, Eastern Associated Coal Corp. ("Eastern Associated"). Operating as Eastern's wholly-owned subsidiary, Eastern Associated signed several multiemployer collective bargaining agreements (including the 1974, 1978, 1981, and 1984 contracts), participated in the UMWA Health and Retirement Funds, and systematically forwarded to its parent Eastern, in the form of dividends or other transfers, tens of millions of dollars of earnings from Eastern Associated's coal operations. Nevertheless, under the assignment criteria established by Congress in Section 9706 of the Coal Act, 26 U.S.C. § 9706, petitioner has been assigned financial responsibility for the health care of certain former employees and their dependents *only if* the retirees in question *never worked* for Eastern Associated or any other employer that signed a coal wage agreement in 1978 or thereafter. That is, Eastern is obliged to pay for the health care of certain of *its own* former employees, but not for any persons who ever worked for Eastern Associated or any other post-1978 signatory employer. All of this is ignored in the petition. Similarly, the petition distorts the reasoning of the courts below, which (like all of the other federal courts that have rendered judgment on the Coal Act) rejected petitioner's arguments and sustained the statute in its entirety.

To put the Coal Act and the present dispute in its proper context, we first review the nearly 50-year history of the UMWA Health & Retirement Funds, petitioner's substantial participation in those Funds, and the financial crisis that afflicted the Funds. We then turn to the Coal Act itself and its legislative history, explaining the provisions of the statute, the reasons for the congressional intervention, and the basis for Congress's conclusion that the problem could not be solved through private collective bargaining. Finally, we summarize the decisions below and the grounds on which petitioner's constitutional challenges were rejected.

A. The UMWA Multiemployer Health And Medical Funds

For more than 40 years, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association representing various companies in the coal industry, have entered into a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA required signatory coal operators to pay contributions to finance health benefits for active and retired miners and their dependents through multiemployer benefit plans. The origin of these plans was an historic agreement between the federal government and the UMWA in 1946.

1. *Establishment of the UMWA Multiemployer Health Care System*

The first coal industry multiemployer benefit plan was created by agreement between the UMWA and the United States, in settlement of a national strike during which the federal government had seized virtually all of the nation's coal mines. The dispute began when, during collective bargaining negotiations between the UMWA and the bituminous coal operators, the UMWA proposed that the parties create a health and welfare fund for its members. The employers rejected the proposal, and a strike ensued. In an effort to end the strike and avoid further disruption in the coal industry and elsewhere in the economy, President Truman issued Executive Order No. 9728 on May 21, 1946, directing Secretary of the Interior Julius Krug to seize the mines. 11 Fed. Reg. 5593 (1946). The order also authorized Secretary Krug to negotiate with the UMWA for changes in the miners' terms and conditions of employment. *Id.*

Those negotiations culminated in what is known as the Krug-Lewis Agreement. The Krug-Lewis Agreement created a multiemployer benefit plan called the United Mine Workers of America Welfare and Retirement Fund (the "1946 W&R Fund"). The 1946 W&R Fund was intended to provide various health and retirement benefits

to UMWA miners and their dependents and survivors. In addition, under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. At the request of Secretary Krug, that survey was conducted, and a report prepared, by Rear Admiral Joel T. Boone of the United States Navy Medical Corps.

In 1947, following the return of the mines to private operation, the UMWA and the coal operators created a new multiemployer benefit plan known as the 1947 UMWA Welfare and Retirement Fund (the "1947 W&R Fund"), which succeeded to the assets and liabilities of the 1946 W&R Fund. Like its predecessor, the 1947 W&R Fund was designed to make payments to UMWA miners and their dependents for a broad range of health and retirement benefits. By the end of December 1948, the 1947 W&R Fund had provided medical benefits and pensions to more than 250,000 coal miners and their families in 26 states.

In 1950, the UMWA and the coal operators created a new multiemployer fund called the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). The 1950 W&R Fund succeeded to the assets and liabilities of the 1947 W&R Fund. Like the 1946 W&R Fund and the 1947 W&R Fund, the 1950 W&R Fund was intended to provide pension and health benefits to UMWA miners and their dependents.[2]

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[2] Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effectively applied only to the 1950 W&R Fund. *See* 26 U.S.C. § 404(c) (1954). In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the facilities of the industry." S. Rep. No. 1622, 83d Cong.,

In July 1950, building upon the 1947 W&R Fund's medical program, the 1950 W&R Fund introduced a comprehensive hospital and medical care program. The program included the payment of unlimited hospitalization and in-hospital medical care for the following classes of beneficiaries: working and unemployed miners; working and unemployed miners' wives and dependent children under age 18; retired miners and their wives; widows of deceased miners; and relatives of deceased miners who cared for the miners' orphaned children. The program's hospital and medical care coverage for miners' widows terminated only upon their remarriage.

During the 28 years of their existence, from 1946 to 1974, the 1950 W&R Fund and its predecessors provided comprehensive health care coverage to UMWA active and retired miners and their families. As such, the Funds had a significant impact on the economies of the bituminous coal producing states and the UMWA mining families that lived in those states. During this period, the 1950 W&R Fund and its predecessors collected approximately $3.9 billion in contributions from signatory coal operators, and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other related benefits, and approximately $2 billion in pension benefits.

2. *The Establishment of the UMWA 1950 and 1974 Benefit Trusts*

The 1950 W&R Fund continued to provide health benefits through the term of the 1971 NBCWA, which ended in 1974. Under the 1974 NBCWA, however, partly in response to the newly enacted Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), BCOA and the UMWA agreed to divide the 1950 W&R Fund into four separate multiemployer plans.[8]

2d Sess. 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4623, 4687. *See also* H.R. Rep. No. 2543, 83d Cong., 2d Sess. 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

[8] In 1974, Congress again enacted special provisions in the Internal Revenue Code to alleviate potential tax burdens to employers that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier. *See* 26 U.S.C. §§ 277, 404(c).

Two of the four new plans provided pension benefits to retired miners. The other two plans provided health benefits to retired miners. One of the health benefit plans, known as the UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Trust"), provided health benefits to eligible UMWA miners who left covered service in the coal industry before 1976. The second plan, known as the UMWA 1974 Benefit Plan and Trust (the "1974 Benefit Trust"), provided health benefits for eligible miners who left covered service in 1976 or thereafter, as well as for the active work force.

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. The 1978 NBCWA continued the multiemployer approach for providing health benefits to eligible persons who left covered service before January 1, 1976, but it provided that persons who completed their covered service on or after that date would receive their health benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained to provide health benefits on a multiemployer basis to eligible persons who left covered service on or after January 1, 1976 and whose last signatory employers were no longer in business.

B. The Crisis That Threatened The UMWA Trusts' Beneficiaries And The Efforts To Resolve It

During the past decade, the problems that led to the 1978 restructuring of the collectively bargained multiemployer health care system became more acute and

threatened the 1950 and 1974 Benefit Trusts' ability to continue providing health benefits to their beneficiaries. The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the nation's bituminous coal mining regions and threatened the economies of several coal-producing states.[4]

One of the most serious labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and its related entities. When collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the dispute, Secretary Dole established a special advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). The Secretary authorized the Coal Commission to analyze the retiree health care crisis and recommend a solution. Former Secretary Usery was appointed Chair of the Coal Commission.

The Coal Commision submitted its findings and recommendations to Secretary Dole in November 1990 in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People."[5] In analyzing the health care crisis in the coal industry, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their de-

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[4] *See, e.g.*, 136 Cong. Rec. S12312 (statement of Senator Rockefeller) (daily ed. Oct. 2, 1989) ("the [UMWA health] funds contribute many millions of dollars to the West Virginia economy and sustain the efforts of many health care practitioners and organizations. If allowed to continue unchecked, the financial difficulties in the UMWA health funds could cripple health care delivery in West Virginia and in coal counties of states like Alabama, Arkansas, Colorado, Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and Virginia").

[5] A copy of the Coal Commission Report, as it appeared at pages 1320-1426 of the joint appendix in the court of appeals, has been lodged with the Clerk of this Court.

pendents should be the primary objective of any proposed solution:

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

Coal Commission Report at 1. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

Id. at 29. The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." *Id.* at 2.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." Coal Commission Report at 2.[6] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Finally, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.* In light of these facts, and its finding that the 1950 and 1974

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[6] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, "by 1990, companies making contributions to the [UMWA Benefit Trusts] account[ed] for only 30 percent of national coal production."

Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. *Id.* at 3.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis. By its very nature, collective bargaining could address only those employers that were still mining coal and were still doing so with employees represented by the UMWA. Such bargaining thus could not hope to deal with the ever-growing number of orphan retirees. Accordingly, the Commission recommended two alternative statutory approaches.

The Coal Commission's first approach called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees; and (2) a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. Coal Commission Report at 61-64. The second approach called for the creation of a single, private multiemployer plan, financed by present and former NBCWA signatories, to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. *Id.* at 65-69. Whereas the first approach would have generated revenues through an industry-wide tax, the second approach imposed liability only upon employers (and their related business entities) that were signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts*, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

Id. at 65 (emphasis added).[7]

C. Congressional Solution To The Health Care Crisis In The Coal Industry—The Coal Act

Following the Coal Commission's Report, Congress undertook its own intensive examination of the subject. The Coal Act was the final product of those deliberations. In enacting the Coal Act, Congress found that

> it is necessary to modify the private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

App. 1a. Congress further stated that the policy of the Coal Act is

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Id.

In the Coal Act, Congress created two new trust funds for the provision of health care benefits to retired miners and their dependents. One of those funds, the Combined Fund, is at issue in the present case.[8] As the statute required, the 1950 and 1974 UMWA Benefit Trusts were merged into the Combined Fund as of February 1, 1993. *See* 26 U.S.C. § 9702(a)(2). The Combined Fund now provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and

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[7] Eastern erroneously asserts (Pet. 8) that the Coal Commission's second approach was limited to 1978 or later NBCWA signatories. That is not accurate.

[8] The Coal Act also created the 1992 United Mine Workers of America Benefit Plan ("1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712.

were receiving, benefits from the 1950 Benefit Trust or the 1974 Benefit Trust. 26 U.S.C. § 9703(a), (b)(1), (e), (f).

In the Coal Act, Congress adopted a financing arrangement for the Combined Fund similar to the second approach recommended by the Coal Commission, under which only employers that were signatory to one or more NBCWAs are required to share the burden of financing health benefits for the affected retirees and their dependents. The Coal Act reflects Congress's determination that those companies that participated in the contractual multiemployer health care system in the coal industry and that actually employed the retirees still receiving benefits from that system should bear the financial responsibility for providing health care benefits to such retirees and their dependents.

Congress implemented this "pay for your own" policy by creating a statutory system under which the Secretary (now, the Commissioner) would assign to signatory operators certain of their former employees among the Combined Fund's beneficiaries. *See* 26 U.S.C. §§ 9704, 9706. Each employer's annual liability is based on the number of beneficiaries that have been assigned to it by the Secretary in accordance with a specific list of priorities set forth in the statute. *See* 26 U.S.C. § 9706. Under the detailed statutory criteria, the Secretary was required to place a higher assignment priority on post-1978 NBCWA signatories than on pre-1978 NBCWA signatories.[9]

[9] Specifically, the Secretary was first required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a)(1). If the Secretary could not assign a retiree to a coal operator pursuant to this first method, she was next required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. 26 U.S.C. § 9706(a)(2). Third, if she could not assign a retiree to a coal operator pursuant to the first two methods, the Secretary was required to assign the retiree to the pre-1978 signatory operator that employed the retiree for the longest period of time. 26 U.S.C. § 9706(a)(3). If the Secretary could not identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining in business) and that formerly employed a particular retiree, the retiree was designated an "unassigned beneficiary". 26 U.S.C. §§ 9704(d), 9705.

Under the Coal Act, the cost of financing health care coverage for orphan retirees and their dependents (*i.e.*, beneficiaries who could not be assigned to any former employer) is to be shared by the employers that voluntarily participated in the UMWA multiemployer health benefits system and that have been assigned Combined Fund beneficiaries under the criteria set forth in Section 9706. The statute provides for an "unassigned beneficiaries premium," to be allotted among signatory operators on the basis of their pro rata share of the beneficiaries that have been assigned. 26 U.S.C. § 9704(d). Congress determined that all of the employers that voluntarily participated in the collective decision to provide health care through pooled multiemployer plans and that still had beneficiaries in those plans contributed to the origins of the health care crisis in the coal industry and should be part of the solution.

To help alleviate the financial burden of health care for unassigned beneficiaries, Congress authorized three transfers of $70 million each to the Combined Fund from the UMWA 1950 Pension Plan and Trust ("1950 Pension Trust"). These transfers were made on the first day of each of the Combined Fund's first three fiscal years. 26 U.S.C. § 9705. Thereafter, Congress authorized additional annual transfers, to be made from the Abandoned Mine Reclamation Fund established under the Surface Mining Control and Reclamation Act of 1977. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h) (1994). These transfers, the first two of which have amounted to nearly $80 million, may be used only to defray the expense of providing health benefits to unassigned beneficiaries. To date, these transfers have completely offset these orphan beneficiary health care costs, and no assigned

operator has had to pay an unassigned beneficiaries premium.

Congress made no attempt to rewrite the collective bargaining agreements or to readjust the contractual rights and liabilities of the parties to the NBCWAs. Instead, Congress simply used the termination date of the 1988 NBCWA, February 1, 1993, as the date on which the old collectively bargained system would be replaced by the new statutory trusts. The Coal Act explicitly provides that all pre-February 1, 1993 contractual obligations to the 1950 and 1974 Benefit Trusts are to be governed exclusively by the applicable collective bargaining agreements. 26 U.S.C. § 9708.

D. Petitioner's Participation In The UMWA Trusts And Its Role In The Financial Crisis That Led To The Passage Of The Coal Act

Eastern Gas & Fuel Associates, later known as Eastern Enterprises, was organized in Massachusetts as a business trust in 1929 and, through its Coal Division, conducted extensive coal operations, employing UMWA miners, until 1966. Eastern participated in, and contributed to, the UMWA Trusts from the inception of the 1946 W&R Fund. Eastern signed the NBCWAs of 1947 and 1950, and the 1951, 1952, 1955, 1956, 1958, and 1964 amendments to the 1950 NBCWA. As a signatory to these agreements, Eastern participated in, and contributed to, the 1947 and 1950 W&R Funds. During the period from August 1946 through December 1965, Eastern contributed more than $60 million to the 1950 W&R Fund and its predecessors. UMWA miners employed by Eastern earned service credits that contributed to their eventual eligibility for retiree health care from the UMWA Trusts.

In 1963 Eastern created Eastern Associated as a wholly-owned subsidiary of Eastern. By January 1, 1966, Eastern transferred its Coal Division assets to Eastern Associated. Thereafter, for more than 20 years, Eastern Associated conducted coal mining operations, employing UMWA miners, for the ultimate benefit of Eastern and its

shareholders. Eastern Associated participated in, and contributed to, the 1950 W&R Fund and the 1950 and 1974 Benefit Trusts. Between January 1966 and December 1987, Eastern Associated contributed more than $233 million to the 1950 W&R Fund and its successors.

Eastern continued to derive substantial monetary benefit from its wholly-owned subsidiary, Eastern Associated. In 1966 Eastern received a $500,000 dividend from Eastern Associated, and in 1970 Eastern Associated transferred stock as a dividend to Eastern at a cost to Eastern Associated of $1,475,000. Eastern then sold the stock for a gain of $9,433,000 after paying taxes of $4,042,000. Eastern received numerous additional dividends from Eastern Associated, including at minimum $16,000,000 in 1971, $20,000,000 in 1972, $7,000,000 in 1976, $1,500,000 in 1977, and $24,162,854 in 1986.

In 1987, Eastern sold Eastern Associated to respondent Peabody Holding Company ("Peabody"). Eastern continues to be registered as a business in Massachusetts. It currently owns three subsidiaries. Boston Gas, Midland Enterprises, Inc., and WaterPro Supplies Corporation.

Eastern initially was assessed premiums for 1494 beneficiaries in the Combined Fund's first fiscal year and 1430 beneficiaries in the Combined Fund's second fiscal year. No beneficiary assigned to Eastern worked for Eastern Associated or any other employer that signed a 1978 or later NBCWA, and, in accordance with Section 9706 (a)(3) of the Coal Act, all of the retirees assigned to Eastern worked for Eastern for a longer period of time than they worked for any other still-existing signatory operator in the coal industry. Following the initial assignment of beneficiaries by the Secretary, the Trustees of the Combined Fund sent to Eastern and the other assigned operators assessments for the annual health care premiums required by the Coal Act.[10] *See* 26 U.S.C. §§ 9702(c), 9704(g)(1), 9704(i)(2).

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[10] For the Combined Fund's first five fiscal years, which include the eight-month period from February 1, 1993 through September

E. Proceedings In The Courts Below

Petitioner filed this case in November 1993. Claiming that the Coal Act violates the Due Process and Takings Clauses of the Fifth Amendment, Eastern sought declaratory and injunctive relief against enforcement of its obligations to pay annual health care premiums under the statute. Under Section 9706(f) of the Coal Act, Eastern also submitted to the Commissioner of Social Security requests for administrative review of the beneficiary assignments made to Eastern. Thereafter, Eastern amended its complaint to include a claim that all of the assignments to Eastern were erroneous and that the beneficiaries in question should have been assigned to Eastern Associated. The Trustees of the Combined Fund answered and counterclaimed for a declaratory judgment that the Coal Act is valid economic regulatory legislation. Eastern then filed a third-party complaint against Peabody, Eastern Associated, and another Peabody subsidiary, claiming that if Eastern is lawfully obligated to pay annual health care premiums under the Coal Act, then Peabody must indemnify Eastern for that obligation, as a result of Peabody's acquisition in 1987 of the stock of Eastern Associated.

The district court decided to address first Eastern's statutory challenge to the assignment of beneficiaries, and the court therefore awaited the Commissioner's ruling on Eastern's contention that all of the beneficiaries should have been assigned to Eastern Associated. The Commissioner, acting in the context of Eastern's challenge to the assignment of miner Samuel East and his widow, sustained the assignment, observing that Mr. East had worked for Eastern for many years and had never worked for Eastern Associated. Since there is no question that Eastern remains in business, the Commissioner ruled that the assignment was appropriate under 26 U.S.C. § 9706(a)(3). Treating the Commissioner's determination with respect to Mr. and Mrs. East as a test case, the district court held

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30, 1993, and the four years thereafter through September 30, 1997, Eastern has been assessed a total of $16,836,791.

that the assignment was clearly proper under the Coal Act. The court thus rejected Eastern's statutory claim that all of the beneficiaries assigned to Eastern should have been assigned instead to Eastern Associated. Pet. App. A-25 to A-35.

After receiving additional summary judgment submissions from the parties, the district court turned to Eastern's constitutional claims. Relying heavily on three previous court of appeals decisions in three different circuits sustaining the validity of the Coal Act, the district court granted summary judgment for the government and the Combined Fund. Pet. App. A-25 to A-27, *citing Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir., *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Company, Inc. v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). The court entered final judgment under Fed. R. Civ. P. 54(b) with respect to Eastern's statutory and constitutional claims. In accordance with an agreement of the parties, the court stayed Eastern's third-party claims against Peabody pending completion of appellate review of the judgment entered under Rule 54(b).

The court of appeals affirmed. Pet. App. A-1 to A-23. By the time of the First Circuit's decision, two other courts of appeals had joined the Second, Sixth, and Seventh Circuits in upholding the constitutionality of the Coal Act. *See Holland v. Keenan Trucking Co.*, 102 F.3d 736, 741-42 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1138-39 (4th Cir. 1996); *Lindsey Coal Mining Co. Liquidating Trust v. Chater*, 90 F.3d 688 (3d Cir. 1996). As the court of appeals correctly observed in this case, Eastern's "constitutional arguments are retreads which have taken their lumps from courts of appeals in five other circuits." Pet. App. A-2. The court rejected Eastern's "substantive due process" argument, holding that "[r]ationality review yields a positive result in this case." Pet. App. A-12; *see also id.* at A-9 to A-18. Similarly, the court dismissed Eastern's Takings Clause

argument, ruling that "there is no basis whatever for the appellant's claim that the statute transgresses the Takings Clause." Pet. App. A-23.

ARGUMENT

The decision of the court of appeals is correct, and review by this Court is unwarranted. Eight panels of six courts of appeals (including the decision below) have unqualifiedly upheld the constitutionality of the Coal Act in the face of challenges like petitioner's. *See LTV Steel Company, Inc., v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Lindsey Coal Mining Co. Liquidating Trust v. Shalala*, 90 F.3d 688 (3d Cir. 1996); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir.), *cert. denied*, 117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996).

In addition, a number of district courts have sustained the Coal Act against constitutional attacks. *Lone Star Steel Company v. Chater*, C.A. No. 3:94-CV-652-R (N.D. Tex. Aug. 30, 1996) (Coal Act does not violate Due Process or Takings Clauses); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996) (same); *Holland v. Imperial Colliery Co.*, C.A. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995) (Coal Act, on its face, does not violate Appointments Clause, and does not violate Due Process or Takings Clauses, or Separation of Powers or Vested Rights doctrines, as applied to Imperial); *Mary Helen Coal Corp. v. Hudson*, C.A. No. 3:97CV71 (E.D. Va. Aug. 28, 1997); *Bellaire Corp. v. Chater*, C.A. No. 93-183 (D.D.C. April 21, 1997); *Associated Electric Cooperative, Inc. v. Hudson*, C.A. No. 93-944 (D.D.C. April 21, 1997); *Association of Bituminous Contractors v. Shalala*, C.A. No. 93-2304 (D.D.C. April 21, 1997), *appeal pending*, No. 97-5132 (D.C. Cir. docketed May 27, 1997); *Unity Real Estate Co. v. Hudson*, C.A. No. 93-1802 (W.D. Pa. March 18, 1997), *appeal pending*, No. 97-3234 (3d Cir. docketed April 30, 1997); *Barnes & Tucker Co. v. Hudson*, C.A. No. 93-264J (W.D. Pa. March 18, 1997), *appeal pending*, No. 97-3236 (3d Cir. docketed April 30, 1997).[11]

There is no suggestion by petitioner that a conflict among the courts of appeals exists, or is even likely to occur in the future. As petitioner acknowledges, the courts of appeals have uniformly sustained the constitutionality of the Coal Act. Here, as in the earlier Coal Act cases in which this Court has denied review, the agreement among the courts of appeals and district courts, and the consistency of the many rulings upholding the Coal Act with the precedents of this Court, militate strongly against further examination of the same legal arguments that have been rejected repeatedly without dissent in jurisdiction after jurisdiction.

Nor is there any unresolved or controversial question of federal constitutional law presented here. Like many other companies that have challenged the Coal Act, petitioner attempts to show that its situation is unique. The attempt fails, however. Many other companies subject to liability under the Coal Act continued making contributions to the UMWA Trusts through February 1, 1993 and thus did not "dump" beneficiaries into the UMWA Trusts as some employers did. But this fact did not absolve these contributing employers of Coal Act liability. *See* 26 U.S.C. §§ 9704, 9706 (imposing liability on NBCWA signatory employers having beneficiaries in the Combined

[11] Eastern cites *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995), in which the district court preliminarily enjoined enforcement of the Coal Act as applied to a particular company. As the unpublished final decision cited in the text shows, however, the district court later vacated that preliminary ruling and granted summary judgment for the Trustees and the Commissioner, holding that there was no Takings Clause violation. Thus, no district or appellate court anywhere has ruled that the Coal Act violates the Constitution.

Fund, including signatories that made collectively bargained contributions throughout the period from 1946 to 1993 and that plainly did not "dump" beneficiaries into the multiemployer trusts). Eastern therefore has no basis to contend that Eastern Associated's ongoing contributions to the UMWA Trusts somehow impose a constitutional obstacle to any statutory liability on the part of Eastern. Congress decided that Eastern should pay for the health care of those retirees that Eastern employed and Eastern Associated did not. Neither the Due Process Clause nor the Takings Clause forecloses this legislative choice.

I. THE COURT OF APPEALS CORRECTLY RULED THAT PETITIONER'S LIABILITY UNDER THE COAL ACT IS NEITHER ARBITRARY NOR IRRATIONAL AND DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS

Petitioner's main complaint is that, in reviewing Congress's determination that companies should be held responsible for their former employees' health benefits, the court of appeals should have accorded more weight to the fact that Eastern was "replaced" in the coal industry by Eastern's wholly-owned subsidiary, Eastern Associated, and that therefore Eastern did not "dump" former employees into the Combined Fund's orphan beneficiary pool by leaving the coal industry or by switching to non-UMWA miners. Eastern erroneously jumps from this factual premise to the conclusion that Eastern in no way contributed to the conditions that led to the Coal Act and that therefore application of the statute to Eastern is impermissible. As the court of appeals correctly ruled, however, Eastern takes "much too crabbed a view of the historical record." Pet. App. A-14. Eastern's argument also relies on an improperly restricted conception of what Congress and the courts may consider in assessing the rationality of economic legislation.[12]

[12] Although the court of appeals, citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), viewed the Coal Act as retroactive legislation and sustained the statute notwithstanding that

The court of appeals acknowledged Eastern's argument but found it insufficient:

> Congress and the Coal Commission both reviewed the historical record and concluded that pre-1974 signatories had made an implicit commitment to furnish [retiree health] benefits. Since Eastern, as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those benefits is hardly irrational.

Pet. App. A-13 (citations omitted). Eastern (Pet. 17 n.6) rejects this reading of the pre-1974 NBCWAs and asserts that "no reasonable person reading them would think that they made any such promise." However, a great

label, *Landgraf* also said that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269. *See also United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 741 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (a statute that "imposes liability for the *present and future* conditions resulting from past acts" is not retroactive) (emphasis in original). By contrast to the Black Lung Benefits Act and the Multiemployer Pension Plan Amendments Act, the Coal Act does not require any payments for periods before the statute's enactment. The Coal Act focuses entirely on future health care coverage for eligible beneficiaries. It does not upset, or alter in any way, prior contractual obligations concerning the provision of health care benefits during the period before the Combined Fund began providing benefits on February 1, 1993. Indeed, the statute expressly provides that it shall have no effect on pre-February 1, 1993 contractual obligations to provide retiree health benefits. 26 U.S.C. § 9708. The Coal Act thus left prior collective bargaining agreements unchanged and fully effective, recognized that future collective bargaining with an ever-decreasing number of employers could not solve the problems of the UMWA Trusts, and prospectively substituted a new remedial statutory system for the preexisting contractual regime. As the court of appeals correctly ruled, however, even if the Coal Act is considered to be retroactive in some sense, the rational basis standard is still the test for evaluating the legislation. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

many courts have agreed with the First Circuit that all NBCWA signatories played some role in creating a legitimate expectation of lifetime benefits, and no court has agreed with petitioner. *See, e.g., UMWA v. Nobel,* 720 F. Supp. 1169, 1173, 1178 (W.D. Pa. 1989), *aff'd without opinion,* 902 F.2d 1158 (3d Cir. 1990), *cert. denied,* 499 U.S. 904 (1991); *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust,* 826 F.2d 280, 282 (4th Cir. 1987), *cert. denied,* 485 U.S. 935 (1988); *In re Chateaugay,* 945 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 502 U.S. 1093 (1993); *Keenan Trucking,* 102 F.3d at 736; *Lindsey,* 90 F.3d at 694; *Blue Diamond,* 79 F.3d at 522; *Davon,* 75 F.3d at 1124.

The court of appeals made several other points in support of its conclusion that Congress acted rationally in holding petitioner liable under the Coal Act. First, it noted that the Coal Act "takes some pains to shield companies like Eastern from disproportionate liability." Pet. App. A-15; *see* 26 U.S.C. §§ 9705, 9706(a). As the court explained,

> Eastern and companies like it are third in the hierarchical order of assignment; they will never feel the statutory sting if a 1978 (or more recent) NBCWA signatory which employed a particular miner still exists, or if any other non-defunct company employed the miner for a longer period of time than they did.

Moreover, the court observed, Eastern's right to "seek recompense from companies like [Eastern Associated] is statutorily preserved." *Id.; see* 26 U.S.C. § 9706(f)(6). Finally, the court reminded Eastern that its former subsidiary Eastern Associated had "returned tens of millions of dollars in dividends to Eastern during the post-1966 period." *Id.*

This Court's substantive due process decisions sustaining economic regulatory legislation firmly support the court of appeals (and all of the other courts that have agreed with it). Indeed, the primary case on which petitioner relies, *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), supports the decision to deny Eastern relief. In

Turner Elkhorn, this Court upheld the Black Lung Benefits Act and rejected the coal operators' argument that the statute violated their due process rights by requiring them to compensate former employees who completed their work in the industry before the statute was passed. In doing so, this Court explicitly rejected a theory of blameworthiness as a prerequisite for liability, and it specifically held that Congress did not act arbitrarily or irrationally when it decided to impose financial liability on companies based on past employment relationships. This Court said:

> [I]t is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health.

428 U.S. at 18. The Court went on to declare that "[w]e are unwilling to assess the wisdom of Congress' chosen scheme. . . . It is enough to say that the Act approaches the problem of cost spreading rationally." *Id.* at 19. The same reasoning defeats petitioner's position here.

There is also nothing in this Court's decisions in *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211 (1986), or *Concrete Pipe & Products of Cal. v. Construction Laborers Pension Trust,* 508 U.S. 602 (1993), or Justice O'Connor's concurring opinions in those cases, that suggests that the decision below is incorrect. To the contrary, in *Concrete Pipe,* this Court upheld, against an as-applied substantive due process attack, the pension plan withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The Court explained that "[w]hen the withdrawing employer's liability to the plan is based on the proportion of the plan's contributions (and coincident service credits) provided by the employer during the employer's participation in the plan, the imposition of withdrawal liability is clearly rational." 508 U.S. at 638. Justice O'Connor's concurrences in *Concrete Pipe* and *Connolly* merely observed that the absence

of *any* connection between an employer's conduct and its liability to an employee benefit fund might raise constitutional concerns. 475 U.S. at 211. Here, however, Eastern's undisputed employment relationship with Combined Fund beneficiaries and its direct participation in all of the pre-1966 NBCWAs provide ample connection between Eastern's conduct and the imposed liability. Petitioner's attempts to rely on *Turner Elkhorn* and Justice O'Connor's concurrences in *Connolly* and *Concrete Pipe* are similar to the appellant's argument in *LTV*, 53 F.3d at 490, that this Court's decisions in those cases "represent a closed set of permissible justifications." The Second Circuit correctly rejected that argument, holding that, "on the contrary, these cases all reiterate the principle that retrospective cost-spreading statutes must be upheld if there exists a rational connection between a legitimate legislative purpose and the chosen statutory base." *Id.*[13]

Eastern's effort to slough off all financial responsibility for its retirees' health care and to shift that responsibility to its former subsidiary Eastern Associated overlooks two critical points. First, as emphasized above, none of the beneficiaries that were assigned to Eastern ever worked for Eastern Associated. Second, every NBCWA—not only the NBCWAs and numerous amendments that Eastern signed but the several later NBCWAs, including the NBCWAs of 1974, 1978, 1981, 1984, and 1988—was effective only for a term of years. This was just as true of the NBCWAs that referred to a "Health Services card until death" as it was of the earlier agreements. After each contract terminated, the continued provision of health care depended on the negotiation and signing of a new national collective bargaining agreement that contained such benefits. In the absence of a legislative solution, the signatories of the 1988

[13] Petitioner asks this Court to "resuscitate" *Railroad Retirement Board v. Alton*, 295 U.S. 330 (1935). *See Gray*, 467 U.S. at 733. However, as the court of appeals pointed out, this Court's "comments have made clear that [*Alton*] should be regarded as a dead letter." Pet. App. A-18 n.7. Moreover, even if *Alton* were still good law, its facts are readily distinguishable from those here. Pet. App. A-16 n.6. *See also LTV*, 53 F.3d at 488-89.

NBCWA could have refused to sign a new collective bargaining agreement in 1993 or thereafter and then claimed that they had no further obligation to fund health care for their own former employees or anyone else's. It was precisely this situation that Congress sought to address in the Coal Act.

In short, petitioner has offered nothing new that in any way would call into question the conclusion correctly reached by both courts below and every other court that has considered the matter—Congress acted rationally in including Eastern and other former NBCWA signatories among those that are required to finance the benefits provided by the Combined Fund. Eastern's entire argument ignores the central question that confronted Congress during its deliberations on the Coal Act: who would pay for retiree health care in the coal industry after termination of the 1988 NBCWA. To answer this question Congress chose to assess Coal Act liability based on a finding of "responsibility" derived from past employment relationships rather than contractual promises. There was, and is, nothing irrational about that approach.[14]

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COAL ACT DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PETITIONER'S PROPERTY

In addressing Eastern's Takings Clause challenge, the court of appeals stated: "The Supreme Court has warned that when a due process argument has proven unavailing, 'it would be surprising indeed to discover the challenged statute nonetheless violating the Takings Clause.'" Pet. App. A-19 (quoting *Concrete Pipe*, 508 U.S. at 614). Pointing to this statement, Eastern accuses the court below of conducting a less-than-thorough review of Eastern's Tak-

[14] Indeed, as the court of appeals observed, "[i]n many respects, the system currently in place is more rational than the alternative that Eastern proposes. . . . [T]he Coal Act bases liability on actions throughout the time frame when miners' expectations were formed." Pet. App. A-15 n.5.

ings Clause arguments. The court of appeals' opinion, however, belies this contention. *See generally* Pet. App. A-19 to A-23.

As even petitioner grudgingly concedes, the court of appeals addressed the very three factors that this Court identified in *Connolly* and in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), as relevant to the Takings Clause inquiry—the economic impact of the regulation, the extent to which the regulation has interfered with distinct and reasonable investment-backed expectations, and the character of the government action. The court correctly concluded that "the statutory scheme, as applied, does not impermissibly confiscate Eastern's property." Pet. App. A-23.

With respect to the economic impact of the Coal Act, the court of appeals followed this Court's approach in *Connolly* and *Concrete Pipe* and considered whether "Eastern's liability is reasonably related to its experience with the benefit plans that eventually blended into the Combined Fund." Pet. App. A-20. In this regard, the court observed that "it is highly significant that the extent of Eastern's statutory liability depends on its links to the provision of health benefits for particular miners." *Id.* at A-20 to A-21. Given the beneficiary assignment criteria set forth in Section 9706 of the statute, the court ruled, "Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans." *Id.* at A-21. The court of appeals thus echoed all of the other federal courts that have considered Takings Clause challenges to the Coal Act.

As the court recognized, it does not matter, for purposes of the economic proportionality of Eastern's Coal Act liability, that Eastern Associated contributed to the UMWA multiemployer trusts in the years after Eastern transferred its coal operations to Eastern Associated. Eastern has been assigned Coal Act liability only for retirees who worked for Eastern and not for Eastern Associated

or any other post-1978 signatory employer. This fact, together with the Coal Act provisions that "moderate the statutory toll" by transferring substantial sums to the Combined Fund from non-employer sources, demonstrates that the Coal Act's economic impact is, in the court of appeals' phrase, "constitutionally tolerable." Pet. App. A-21.

Turning to the question whether the Coal Act improperly interfered with Eastern's distinct and reasonable investment-backed expectations, the court of appeals correctly held that, "[h]aving contributed to the expectation of lifetime benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Pet. App. A-22. This was especially so, in the court's view, because of the historical pattern of federal involvement with the coal industry and the UMWA multiemployer trusts. Against this background, the court said, "Eastern cannot reasonably . . . feign astonishment when a measure like the Coal Act is passed to forestall further labor unrest." *Id.* The court thus followed several other federal courts that have considered and rejected arguments similar to those that Eastern makes here. *See, e.g., Blue Diamond*, 79 F.3d at 525-26; *Davon*, 75 F.3d at 1128-29; *LTV*, 53 F.3d at 495-96.

Nor is Eastern helped by its related complaint that the contractual health care commitments in the NBCWAs were valid only during the life of the agreements. As this Court explained in *Connolly*:

> "Contracts, however, express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935).

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

475 U.S. at 223-24 (citation omitted). *See also Concrete Pipe*, 508 U.S. at 639-41; *Davon*, 75 F.3d at 1114; *LTV*, 53 F.3d at 495.

Finally, with respect to the third *Connolly-Penn Central* factor, the character of the governmental action, the court of appeals properly stressed that "[t]he Coal Act, like the MPPAA, is merely a public program that readjusts economic burdens . . . ." Pet. App. A-23. It involves no physical occupation, invasion, or appropriation of property. Coal Act premiums "are paid to a private benefit fund, not to a government entity." *Id.* They are intended not for the government's own use but to provide health care for thousands of UMWA retirees and their dependents. Far from being unique, therefore, the Coal Act has characteristics comparable to other economic legislation that has already passed constitutional scrutiny. *See, e.g., Turner Elkhorn*, 428 U.S. at 17-18; *Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d at 734. The Coal Act "adjusts the benefits and burdens of economic life to promote the common good," and it is, consistent with this Court's prior decisions, constitutional legislation. Pet. App. A-22 (quoting *Connolly*, 475 U.S. at 225).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MOONEY
MOONEY, GREEN, BAKER GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

PETER BUSCEMI
Counsel of Record
DAVID LUBITZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 467-7190

Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

September 3, 1997

APPENDIX

APPENDIX

Subtitle C—Health Care of Coal Miners

Sec. 19141. Short Title.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992".

Sec. 19142. Findings and Declaration of Policy.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Sec. 19143. Coal Industry Health Benefits Program.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS

"Subchapter A—Definitions of General Applicability

"Sec. 9701. Definitions of General Applicability.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.—

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan

described in section 404(c) (or a contination thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3) 1974 UMWA PENSION PLAN.—The term '1974 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA BENEFIT PLAN.—The term '1992 UMWA Benefit Plan' means the plan referred to in section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section—

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Asociation, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section—

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means a person which is or was a signatory to a coal wage agreement.

"(2) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

"(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

"(3) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

"(4) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(5) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible benefi-

ciary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) BUSINESS.—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"(a) ESTABLISHMENT.—

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

"(3) TREATMENT OF PLAN.—The Combined Fund shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

"(b) BOARD OF TRUSTEES.—

"(1) IN GENERAL.—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest

number of eligible beneficiaries under section 9706;

"(C) two individuals designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

"(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. Plan Benefits.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), the coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund

which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined under subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

"(II) the trustees elect to use to pay benefits for the current year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

"(3) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services

which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

"(4) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

"PART II—FINANCING

"Sec. 9704. Liability of Assigned Operators.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per

beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

"(A) the amount determined by dividing—

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(3) ADJUSTMENTS FOR MEDICARE REDUCTIONS.—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be

required to pay during the plan year for death benefits coverage described in section 9703(c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES.—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

"(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

"(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

"(C) NO AUTHORITY FOR INCREASED PAYMENTS.—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703 (b)(2).

"(f) APPLICABLE PERCENTAGE.—For purposes of this section—

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the

following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.—

"(1) IN GENERAL.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(2) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.—

"(1) 1988 AGREEMENT OPERATORS.—

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such op-

erator for the plan year beginning February 1, 1993.

"(ii) DEFICIT PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

"(iii) LIMITATION.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

"(iv) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"(3) STARTUP COSTS.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

"Sec. 9705. Transfers.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN.—

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704 (a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER.—

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1)—

"(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

"(5) TREATMENT OF TRANSFER.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND.—

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

"Sec. 9706. Assignment of Eligible Beneficiaries.

"(a) IN GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

"(b) RULES RELATING TO EMPLOYMENT AND REASSIGNMENT UPON PURCHASE.—For purposes of subsection (a)—

"(1) AGGREGATION RULES.—

"(A) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

"(B) CERTAIN EMPLOYMENT DISREGARDED.—Employment with—

"(i) a person which is (and all related persons with respect to which are) no longer in business, or

"(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such succesor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) COOPERATION.—The head of any department, agency, or instrumentality of the United

States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY.—

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

"(f) RECONSIDERATION BY SECRETARY.—

"(1) IN GENERAL.—Any assigned operator receiving a notice under section (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the work history of the beneficiary and the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR.—If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) DETERMINATIONS.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(6) PRIVATE ACTIONS.—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III—ENFORCEMENT

"Sec. 9707. Failure to Pay Premium.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY.—

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the

Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS.—No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on Pending Claims or Obligations.

"All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan

and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

"Subchapter C—Health Benefits of Certain Miners

"PART I—INDIVIDUAL EMPLOYER PLANS

"Sec. 9711. Continued Obligations of Individual Employer Plans.

"(a) COVERAGE OF CURRENT RECIPIENTS.—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

"(b) COVERAGE OF ELIGIBLE RECIPIENTS.—

"(1) IN GENERAL.—The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual

employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

"(2) COVERAGE.—Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

"(c) JOINT AND SEVERAL LIABILITY OF RELATED PERSONS.—Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

"(d) MANAGED CARE AND COST CONTAINMENT.—The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

"(e) TREATMENT OF NONCOVERED EMPLOYEE.—The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

"(g) RULES APPLICABLE TO THIS PART AND PART II.—For purposes of this part and part II—

"(1) SUCCESSOR.—The term 'last signatory operator' shall include a successor in interest of such operator.

"(2) REASSIGNMENT UPON PURCHASE.—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

"PART II—1992 UMWA BENEFIT PLAN

"Sec. 9712. Establishment and Coverage of 1992 UMWA Benefit Plan.

"(a) CREATION OF PLAN.—

"(1) IN GENERAL.—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

"(2) TREATMENT OF PLAN.—The 1992 UMWA Benefit Plan shall be—

"(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)).

"(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(b) COVERAGE REQUIREMENT.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to

any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

"(2) ELIGIBLE BENEFICIARY.—For purposes of this section, the term 'eligible beneficiary' means an individual who—

"(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

"(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

"(c) HEALTH BENEFITS.—

"(1) IN GENERAL.—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) MANAGED CARE.—The 1992 UMWA Benefit Plan shall develop managed care and cost contain-

ment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

"(3) MAJOR ELEMENTS OF RULES.—Elements described in this paragraph are—

"(A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

"(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

"(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

"(D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,

"(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

"(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

"(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

"(4) LAST SIGNATORY OPERATORS.—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

"(5) STANDARDS OF QUALITY.—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

"(A) by the settlors, or

"(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

"(d) GUARANTEE OF BENEFITS.—

"(1) IN GENERAL.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988

last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

"(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

"(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

"(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

"(2) ADJUSTMENTS.—The 1992 UMWA Benefit Plan shall provide for—

"(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

"(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

"(3) ADDITIONAL LIABILITY.—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

"(4) JOINT AND SEVERAL LIABILITY.—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

"(5) DEDUCTIBILITY.—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

"(6) 1988 LAST SIGNATORY OPERATOR.—For purposes of this section, the term '1988 last signatory operator' means a last signatory operator which is a 1988 agreement operator.

"Subchapter D—Other Provisions

"Sec. 9721. Civil Enforcement.

"The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

"Sec. 9722. Sham Transactions.

"If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction."

(b) AMENDMENTS TO SURFACE MINING ACT.—

(1) EXTENSION OF FEE PROGRAM.—Section 402 (b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2004".

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) TRANSFER OF FUNDS TO COMBINED FUND.—(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

(3) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402 (h); and".

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g)) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys".

No. 97-42 (4)

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,

Respondents,

v.

PEABODY HOLDING COMPANY, INC.,
EASTERN ASSOCIATED COAL CORP., AND
COAL PROPERTIES CORP.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENTS BRIEF IN OPPOSITION PEABODY HOLDING COMPANY, INC. EASTERN ASSOCIATED COAL CORP. COAL PROPERTIES CORP.

MITCHEL S. ROSS
Counsel of Record
KENNETH A. SWEDER
LAURIE M. RUSKIN
STROOCK & STROOCK & LAVAN
100 Federal Street
Boston, Massachusetts 02110
(617) 482-6800

Counsel for Respondents
Peabody Holding Company, Inc.
Eastern Associated Coal Corp.
Coal Properties Corp.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

21 pp

QUESTIONS PRESENTED

1. Whether the Coal Act explicitly requires the assignment of the beneficiaries in question to Eastern Enterprises.

2. Whether the Social Security Administration's ("SSA") assignments to Eastern Enterprises are mandated by the language of the Coal Act or are based upon the SSA's permissible construction of the statute.

3. Whether the Coal Act violates the Due Process Clause as applied to Eastern Enterprises.

4. Whether the Coal Act violated the Takings Clause as applied to Eastern Enterprises.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., state that an ultimate parent corporation, The Energy Group, PLC, is the only parent, subsidiary (except wholly-owned subsidiaries), and affiliate that has issued shares to the public (traded on the London and New York Stock Exchanges).

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner, Eastern Enterprises. The Defendants to the proceedings below were the Respondents Shirley S. Chater in her capacity as Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustee of the United Mine Workers of America Combined Benefit Fund. The Third-Party Defendants to the action below were the Respondents Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp.

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No. 97-42

In the

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EASTERN ENTERPRISES,

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENTS BRIEF IN OPPOSITION PEABODY HOLDING COMPANY, INC. EASTERN ASSOCIATED COAL CORP. COAL PROPERTIES CORP.

The Respondents Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., respectfully request that this Court deny Eastern Enterprises' petition for writ of certiorari, seeking review of the judgment and opinion

of the United States Court of Appeals for the First Circuit, entered on April 7, 1997. That opinion is reported at 110 F.3d 150 (1st Cir. 1997) (reprinted, along with the Judgment and Orders of the District Court, in the Appendix of Eastern's Petition for a Writ of Certiorari).

STATEMENT OF THE CASE

Respondents and Third-Party Defendants, Peabody Holding Company, Inc. ("Peabody"), Eastern Associated Coal Corp. ("EACC") and Coal Properties Corp. ("CPC") (collectively the "Peabody Respondents"), find the Statement of the Case as presented by Eastern Enterprises ("Eastern") in its Petition For A Writ Of Certiorari, dated July 7, 1997 ("Petition of Eastern"), notable for the manner in which it obscures the relationship between Eastern and the miners assigned to Eastern under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("Coal Act"). Eastern's presentation of the facts thus obscures the underlying facts of the case and misconstrues the liabilities that Eastern is challenging.

A. *The Judgment Under Appeal Involves Coal Act Beneficiaries Who Had No Employment Relationship With The Peabody Respondents.*

There are a number of allegations made in Eastern's Statement of the Case which omit crucial facts with respect to Eastern's relationship to the Peabody Respondents and to the retirees for whom it was assigned responsibility under the Coal Act. Eastern neglects to note the fact that the judgment and opinion of the United States Court of Appeals for the First

Circuit that it challenges here, actually involves the assignment under the Coal Act of two beneficiaries: the late Samuel East, who worked for Eastern for a significant period of time until 1960, and never worked for EACC or any of the Peabody Respondents; and his widow, Josephine East. *See Eastern* v. *Chater, et al.*, 110 F.3d 150, 154 (1st Cir. 1997) (reprinted in the Appendix of the *Petition of Eastern* at A-1, pp. A-6 to A-7). A request for judicial review ensued, in which Eastern asked the lower court to assign responsibility for the Easts to EACC, despite the complete lack of any employment relationship with EACC.[1] *Id.*

The First Circuit noted that Mr. East mined coal for Eastern for 14 years, from 1946 to 1960, and that he then worked for two other companies from 1960 to 1967, retiring in early 1967. *Eastern* v. *Chater, et al.*, 110 F.3d at 154; Petition of Eastern at A-6; JA 2111-2112 at ¶¶ 2, 4 and 6.[2] Thus, according to the First Circuit, for 14 of his 21 years as a miner, Eastern benefited from the work of Mr. East. For many of those years, Eastern contributed to the welfare and retirement funds of the United Mine Workers of America ("UMWA Funds"), and Mr. East and his beneficiary, Josephine East, received benefits from those UMWA Funds. While there may not have been a legal requirement to do so, during those same years, miners such as Mr. East received benefits for life from the UMWA Funds. From the time of his retirement until his death, Mr. East received benefits from the UMWA Funds, even though Eastern stopped contributing to the UMWA Funds in the mid-1960s and even though the other companies Mr. East worked for (C.C. & L. Coal Co. which became

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[1] The First Circuit notes that the Easts are a test case; that the SSA intends to assign approximately 1400 similarly situated miners and beneficiaries to Eastern. *Eastern v. Chater, et al.*, 110 F.3d at 154 n.3; *Petition of Eastern* at A-7, n.3.

[2] The joint record appendix from the United States Court of Appeals for the First Circuit is referred to as "JA."

Calvert Coal Co.) went out of business and ceased contributions in 1977. JA 2112 at ¶¶ 4 and 7. Mrs. East continues to obtain benefits from the Combined Fund. JA 2112 at ¶ 8.

Mr. East was never employed by a signatory to the 1978 (or any more recent) National Bituminous Coal Wage Agreement ("NBCWA"). *Eastern* v. *Chater, et al.*, 110 F.3d at 154; *Petition of Eastern* at A-6. "Thus, because Eastern was the [signatory operator] which had employed East for the longest period of time, the [Social Security Administration] assigned him and his wife to Eastern pursuant to Coal Act § 9706(a)(3)." *Eastern* v. *Chater, et al.*, 110 F.3d at 154; *Petition of Eastern* at A-6.

Mr. East never worked for EACC. *Eastern* v. *Chater, et al.*, 110 F.3d at 158 n.5; *Petition of Eastern* at A-16, n.5; JA 2112 at ¶ 5. In fact, Mr. East had stopped working for Eastern before EACC was even established and had retired entirely from the industry shortly after a transfer of coal industry assets to EACC by Eastern was completed as of 1966. Hence, no contributions to the UMWA Funds were made by EACC with respect to any work performed by Mr. East and EACC obtained no benefits from any such work.

Thus, a crucial distinction, and one that Eastern glosses over in its Petition, is that, in reaching its decision, the Court below rested its judgment upon the fact that the beneficiaries Eastern was challenging had become beneficiaries under the Coal Act because of an extensive employment relationship with Eastern; an employment history which never included EACC or any of the other Peabody Respondents.

B. *Eastern Did Not Sever Its Ties To The Coal Industry When It Established EACC; Instead It Reaped Millions Of Dollars In Profits Through Its Ownership Interest In EACC.*

Eastern also attempts to portray itself as having no connection to the coal industry after the completion of the transfer in 1966. *Petition of Eastern* at 6-7. But just as Eastern reaped a financial reward from decades of labor by miners such as Mr. East, so too did Eastern continue to profit, directly and indirectly, from coal mining during the 1960s, 1970s and 1980s through its ownership interest in EACC. Based on only a partial review of EACC's financial statements,[3] between 1966 and 1986 Eastern extracted over $76 million from EACC in the form of dividends and management fees. Beginning in 1966, EACC paid the following dividends to Eastern: 1970, $1,474,695; 1971, $16,000,000; 1972, $20,000,000; 1976, $7,000,000; and 1977, $1,500,000. JA 357, 397, 439, and 496. Similarly, in that period Eastern caused EACC to pay it the following fees: 1966, $261,940; 1971, $846,272; 1972, $926,000; 1977, $2,141,000; and 1978, $2,271,000. JA 278, 389, 432, 489, and 542. Additional financial statements of EACC show that in 1986, EACC paid $24,162,854 in dividends to Coal Properties Corp., which in turn paid $33,195,159 in dividends to Eastern. JA 2188 and 2191.

Clearly, Eastern seeks to convey the impression that by establishing EACC, Eastern severed its ties to the coal industry by 1966. However, Eastern neglects to acknowledge that not only was EACC controlled and managed by Eastern, but that Eastern profited by EACC's coal mining activities. In all, as the

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[3] Because discovery is still on-going in the third party action, the Peabody Respondents have only reviewed EACC's financial statements for about one-half of the twenty years in question.

First Circuit recognized, "for all the protestations of independence which Eastern makes on EACC's behalf, the fact remains that EACC returned tens of millions of dollars in dividends to Eastern during the post-1966 period." *Eastern* v. *Chater, et al.*, 110 F.3d at 158; *Petition of Eastern* at A-15.

C. *There Is No Evidence That EACC Was To Assume All Of Eastern's Coal Related Liabilities.*

As Eastern acknowledges, from 1946 to 1965, Eastern's Coal Division operated mines, primarily in West Virginia and Pennsylvania. *Petition of Eastern* at 5. In 1963, Eastern incorporated EACC and began to transfer coal assets to EACC. *Id.* at 6. By 1966, Eastern had transferred certain assets of its Coal Division to EACC. *Id.* Eastern claims that EACC assumed all of Eastern's coal-related liabilities, "known and unknown." *Petition of Eastern* at 6. But nowhere in Eastern's Petition or in its voluminous papers submitted to the lower courts is there any evidence of an express agreement on the part of EACC to assume all of Eastern's Coal Division liabilities, known and unknown, let alone the Coal Act liability. In particular, there is no evidence of any written or other agreement made at the time of the transfer of assets from Eastern to EACC whereby EACC agreed to assume from Eastern: (a) liabilities under laws not enacted at the time of the transfer of assets to EACC; (b) unforeseeable liabilities; (c) liabilities not in existence at the time of the asset transfer to EACC; or (d) any statutorily created liabilities, such as those imposed by the Coal Act, for lifetime health benefits for retirees and their dependents. JA 2116 at ¶ 21.

The Stock Exchange Agreement of 1987, pursuant to which Peabody purchased EACC and CPC from Eastern, conclusively shows that EACC had never assumed Eastern's liabilities under

the Coal Act for miners who had never worked for EACC. *See* JA 2206, *et seq*. The Stock Exchange Agreement is explicit as to the liabilities of Eastern for which CPC and EACC were liable. It expressly states that: "CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto." JA 2260. The class of individuals specified consisted of persons who had "retired or otherwise ceased to be employed by CPC or any of its Subsidiaries (including EACC)." JA 2116 at ¶ 22. This class of individuals did not include Eastern retirees who had never worked for CPC or EACC. Schedule 5(c) also makes reference only to a "Benefit Plan for UMWA Represented Employees of EACC and Subs" — not for Eastern employees who had never worked for EACC. *See* Schedule 5(c) to the Stock Exchange Agreement. JA 2116 at ¶ 22.

Eastern claims that EACC is the successor to Eastern's Coal Division and should be deemed to have assumed the liabilities of its Coal Division under the Coal Act. *Petition of Eastern* at 6-7. Even if EACC was a "successor" for some purposes, the assignment by the Social Security Administration to Eastern under the Coal Act was found by the First Circuit to be, nevertheless, correct. *Eastern* v. *Chater, et al.*, 110 F.3d at 155; *Petition of Eastern* at A-9. (Nor will any such successor relationship ultimately support an indemnification or other claim of Eastern against the Peabody Respondents).

In addition to the fact, recognized by the First Circuit, that a proper interpretation of the Coal Act supports the assignment of the Easts to Eastern, it is also notable that virtually all of the evidence cited by Eastern to support its "successor" claim comes from statements of Eastern, or from statements made by EACC during the time that it was owned and controlled by Eastern. JA 2113-2115; *Id.* at ¶¶ 14, 16-18. It is undisputed

that from 1963 to 1987, EACC was a wholly-owned subsidiary of Eastern or one of Eastern's other wholly-owned subsidiaries. As such, Eastern controlled EACC and had the power to direct EACC to make statements and representations concerning its alleged status as successor.

Eastern also controlled EACC's Board of Directors. For example, in 1967 Eastern's President, Eli Goldston, was Chairman of the Board of Directors of EACC. JA 276. Eastern's Senior Vice President-Administration and Finance, J.N. Philips, was Vice Chairman of the Board of Directors of EACC. *Id.* EACC's President, A.P. Boxley, was also Senior Vice President of Eastern. *Id.* Given these facts, and others, it is obvious that Eastern directed the statements made and positions taken by EACC on all issues, including the statements upon which Eastern relies to claim that EACC is the successor to Eastern's Coal Act liability.

D. *EACC Has Been Assigned Its Own Retirees And Beneficiaries.*

It should also be noted that pursuant to the Coal Act, EACC itself has been assigned its own retirees and their dependents. As of October 1, 1994, the SSA had assigned 1,860 beneficiaries to EACC. JA 2112-2113 at ¶ 9. Between October 1, 1994, and September 30, 1995, EACC paid premiums to the Combined Benefit Fund pursuant to the Coal Act of more than $4,000,000.00. *Id.* Among these assignees to EACC are employees who formerly worked for Eastern and then worked for EACC, unlike Mr. East and the others assigned to Eastern who are at issue in this action, who never worked for EACC. *Id.* at ¶ 10.

E. *Other Coal Act Decisions.*

In Eastern's final section of its Statement of the Case, it cites to three other cases which have been denied certiorari before this Court. *See Blue Diamond Coal Co.* v. *Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). Eastern attempts, however, to distinguish these cases from the case at bar by asserting that none of these cases involved a situation similar to Eastern's in that in these cases, the companies challenging the Coal Act left the coal industry without making any provision for the continued contributions to the UMWA. *Petition of Eastern* at 11. However, even if this fact is true, it is irrelevant given that the decisions cited did not rely on whether or not these companies had made such provisions. To the contrary, each of these decisions considered essentially the same arguments proffered by Eastern here and reached the same conclusion as the First Circuit, *i.e.*, that the Coal Act, as it was applied to each of the companies, did not violate the Due Process and the Takings Clauses of the Constitution.

The fact remains that the Second, Sixth and Seventh Circuit Courts have all considered, and affirmed, the constitutionality of the Coal Act. As the First Circuit's decision challenged here, is, in fact, consistent with these three other circuits, there is no reason for any further appellate review.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT CORRECTLY DETERMINED THAT EASTERN MISCONSTRUES THE COAL ACT WHEN IT CLAIMS THAT IT IS UNFAIRLY BURDENED BY THE ACT.

Eastern erroneously argues in its Petition that, as a former coal industry participant, the retroactive cost-spreading of the Coal Act is unnecessarily burdensome. Eastern's reasoning is that a former participant, like Eastern, is not responsible for creating the financial crises that inspired the legislation because Eastern "took the prudent step of creating a substitute," *i.e.*, a successor which maintained a financial commitment to its miners. *Petition of Eastern* at Section I-B, 16-19, & Section I-C, 19-21. Eastern seeks to support its Petition for a Writ of Certiorari on the illusory building block that a "successor" relationship between Eastern and EACC is relevant to the assignment of beneficiaries who never worked for EACC. Thus, according to Eastern, EACC and the other Peabody Respondents somehow became obligated under the Coal Act for Mr. East, and the other employees like him, who never even worked for EACC. This argument was vehemently rejected by the First Circuit:

> There are two gaping flaws in the fabric of Eastern's analysis. In the first place, it is not accurate to claim that only those [signatory operators] which executed NBCWAs in or after 1974 created a legitimate expectation of lifetime health benefits for miners. Congress and the Coal Commission both reviewed the historical evidence and concluded that pre-1974 signatories had made an implicit commitment to furnish such benefits [cites omitted]. Since

> Eastern as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational. . . .
>
> The second hole in [Eastern's] argument is even more ringent. Eastern insists that the Coal Act was a bail-out of the benefit plans, pure and simple; that it did not contribute to the funding shortfalls which necessitated the bail-out; and, thus, that holding it liable under the Act is bizarre. But this is much too crabbed a view of the historical record. The crisis in retiree benefits occurred in two stages: first, the inculcation of an expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed. If the expectations had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen. Thus, it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment.

Eastern v. *Chater, et al.*, 110 F.3d at 157-58; *Petition of Eastern* at A-13 through A-15.

The First Circuit held that the statute itself does not permit an assignment to any purported "true successor," contrary to the contention of Eastern. The First Circuit's characterization of Eastern's argument and the Court's response to that argument is as follows:

> Because section 9706(a) [of the Coal Act] is silent on the question of successor liability, Eastern's thesis runs, the law is ambiguous and the SSA ought to have filled the resultant vacuum in such a way as to have dictated assignment of the Easts to EACC. . . . [However,] [s]ection 9706(a) of the Coal Act unambiguously delineates a classification regime — and that regime, literally applied, requires East's assignment to the appellant as the pre-1978 signatory which employed him for the longest interval . . . Eastern's claim that Congress overlooked the possibility of assignment to successors of a [signatory operator] is unpersuasive. . . . [R]eviewing the language and architecture of the Coal Act as a whole . . . we think it is obvious that Congress purposely omitted any reference to successors in writing section 9706(a)'s assignment scheme. *See generally Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784, 794 n.6 (1st Cir. 1996)(rejecting idea that statutory silence necessarily indicates ambiguity; in an appropriate context, failure to mention an item demonstrates specific congressional intent). [Thus,] the Easts were properly assigned by the SSA in pursuance of the plain terms of the Coal Act.

Eastern v. Chater, et al., 110 F.3d at 154-55; *Petition of Eastern* at A-7 through A-9.

Even if Eastern had "bargained out" of certain of its obligations with respect to its mining operations (which it did not do in any event with respect to the obligations in question), "Congress reasoned that an equitable solution would permit reaching back to place responsibility on those companies which the miners had worked for, notwithstanding their bargaining out of their obligations." *Carbon Fuel Company* v. *USX Corporation*, 100 F.3d 1124, 1133 (4th Cir. 1996). With the Coal Act:

> Congress has chosen to spread the costs of the Combined Fund's benefits to those employers who had profited from the labor of UMWA miners and who, at some time in their histories, had contributed to multi-employer welfare benefit funds.

In re: Blue Diamond Coal Co., (Blue Diamond Coal Co. v. *Shalala)*, 174 B.R. 722, 727 (E.D. Tenn. 1994).

Congress' "express intent" was "that responsibility for financing the cost of providing health benefits to eligible retirees should be placed on those companies which employed [them] and thereby benefited from their services." *Holland* v. *Keenan Trucking Co.*, (S.D. W.Va., slip op., March 15, 1995), at 5, *citing* 138 Cong. Rec. at S17603 (daily ed. Oct. 8, 1992).

Thus, as the First Circuit affirmed, the SSA's assignment of Mr. East to Eastern rather than to EACC is wholly consistent with the intent of the Coal Act. Mr. East worked for Eastern, as noted by First Circuit, for 14 years. Eastern obtained the benefit of all of those years of labor. Mr. East did not work for EACC at any time and EACC obtained no benefits from his work. The profits generated by Mr. East went into the

coffers of Eastern before EACC even came into existence. Moreover, as the First Circuit observed, Mr. East

> was in Eastern's employ during a 14-year period in which he developed a reasonable expectation of lifetime health benefits. In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step.

Eastern v. Chater, et al., 110 F.3d at 158 n.5; *Petition of Eastern* at A-16 n.5.

Congress clearly intended that assignments be made to the employer for whom the retiree worked longest, since that employer obtained the greatest benefit from the retiree's labors. As the company which employed him for the longest period and benefited most from his labor, it is surely Eastern, and not EACC, which Congress intended to make responsible for the benefits received by Mr. East and his dependents.

Eastern argues that because it was replaced in the coal business by EACC, which took over its ongoing responsibilities under the then-existing UMWA funds, it was not one of those companies which primarily caused the crisis by creating "orphan" retirees. *Petition of Eastern* at 18-19. But in *Carbon Fuel*, the Court also dealt with companies which had others take over their responsibilities under the existing UMWA agreements. The Fourth Circuit in *Carbon Fuel* found that, in fact, "those companies that bargained out of their obligations and left the mining business, helped, in part, to cause near financial collapse of the Benefit Plans by causing a small number of signatory companies to bear the entire burden." *Carbon Fuel Company* v. *USX Corporation*,

100 F.3d. at 1133. The Fourth Circuit found that Congress had, therefore, reasoned that it would be equitable to reach back to those companies the miners had worked for, notwithstanding their bargaining out of their obligations under the then existing UMWA Funds. *Id.*

The Fourth Circuit in *Carbon Fuel* also directly answers Eastern's plea for relief from the statute because of the "practical importance" to Eastern in its having raised funds on the assumption that it had no further coal-related liabilities.

The Fourth Circuit held:

> All economic legislation can be said to upset settled economic expectations of someone. "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1976). That principle holds true "even though the effect of the legislation is to impose a new duty or liability based on past acts."

Carbon Fuel Company v. *USX Corporation*, 100 F.3d at 1137.

Thus, Congress very clearly intended that Eastern would be responsible under the Coal Act for the premiums for Mr. East and the others who worked for it and from whom it benefited, notwithstanding the purported expectations of Eastern and the other "reachback" companies that they would not have such responsibilities.

CONCLUSION

For all of the foregoing reasons, Respondents and Third-Party Defendants, Peabody Holding Company, Inc., Eastern

Associated Coal Corp. and Coal Properties Corp. respectfully request that Eastern's Petition for Certiorari be denied.

Respectfully submitted,

MITCHEL S. ROSS
Counsel of Record
KENNETH A. SWEDER
LAURIE M. RUSKIN
Counsel for Respondents
Peabody Holding Company, Inc.
Eastern Associated Coal Corp.
Coal Properties Corp.
STROOCK & STROOCK & LAVAN
100 Federal Street
Boston, Massachusetts 02110
(617) 482-6800

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No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

SHIRLEY S. CHATER,
COMM'R OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

JOHN T. MONTGOMERY
Counsel of Record
ROBERT DANIEL O'CONNOR
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioners

September, 1997

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Introduction

Respondents' briefs rest on the mistaken premise that the First Circuit's decision here is simply another in the long "series of unanimous appellate decisions rejecting challenges to the constitutionality" of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 ("Coal Act"). Fed. Br. 9-10; *see* UMWA Br. at 18-19.[1] The constitutional significance of this case, however, derives from unique circumstances that sharply distinguish Eastern from other coal operators whose efforts to avoid liability have been rejected by the courts. By failing to engage the critical distinctions between Eastern and other companies which have challenged the Coal Act, Respondents diminish the standards for review of economic legislation fashioned by this Court. While certainly deferential, this Court has never adopted the apparent view of Respondents that fundamental unfairness in economic legislation is no more amenable to judicial review than are political questions. Rather, this Court has assiduously reserved for appropriate future cases the delicate task of shaping the boundaries of legislative authority in the economic realm. For the reasons set forth below and in Eastern's Petition, this Court should grant certiorari to review the Coal Act as applied to Eastern.

Argument

I. DUE PROCESS ANALYSIS.

As described in Eastern's Petition, this case presents the Court with an opportunity to determine whether retroactive cost-spreading legislation violates the Due Process Clause of the Fifth Amendment as applied to a party whose conduct did not cause the economic burden the statute was

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[1] Petitioner's Sup. Ct. R. 29.6 disclosure is provided at Pet. ii.

designed to address. This question arises from the admonition in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) that retroactive legislation that lacks a causal connection to the cost to be spread "would present difficulties not encountered" where such a connection exists. The retroactive black lung legislation in *Turner Elkhorn* was constitutional because it "serve[d] to spread costs in a rational manner—by allocating to the operator an actual cost of his business." *Id.* at 24-25. The Court noted, however, that ". . . damages resulting from a miner's death unrelated to the operator's conduct . . . can hardly be termed a 'cost', of the operator's business." *Id.* at 25.

Instead of addressing the limits of due process reserved in *Turner Elkhorn*, Respondents dwell on the similarities between Eastern and other members of the coal industry whose challenges have been rejected by the courts. In particular, Respondents emphasize that Eastern was a member of the coal industry prior to 1965 and is a former employer (typically along with a number of other companies) of the miners assigned to it under the Coal Act. *See* Fed. Br. 15. While that is so, Eastern's contractual obligation prior to 1965 was to a multiemployer plan which undertook to provide benefits to all eligible coal miners. The NBCWAs signed by Eastern attached no significance to the employment relationship between a coal operator and any individual employees. Nor were Eastern's contributions to the UMWA plans made in the name of particular employees, or calculated in relation to the number of miners employed by Eastern. While Congress elected decades later to administer the Coal Act through individual miner assignments to former employers, the proper focus under *Turner Elkhorn* is the lack of connection between Eastern's participation in the coal industry until 1965 and the financial crisis which prompted the enactment of the Coal Act.

The Respondents do not even suggest that the employment of miners by Eastern contributed to the financial crisis which arose years after Eastern's departure from the industry. Indeed, Respondents concede that the financial crisis that led to the passage of the Coal Act resulted principally from the absence of contributions to the UMWA funds in the 1970s and 1980s from companies that either left the coal business or became non-union operators. Fed. Br. 4; UMWA Br. 9. Unlike these companies, Eastern assured a seamless continuation of support for the UMWA plans by transferring its entire coal operation to a fully capitalized successor which was obligated to and did continue to make all required contributions to the plans.[2] *Contrast*, *Blue Diamond Coal Co. v. Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 520 (6th Cir. 1996) ("In 1964, Blue Diamond stopped employing union miners and terminated its obligations to the UMWA fund"), *cert. denied*, 117 S. Ct. 682 (1997); *Dawon, Inc. v. Shalala*, 75 F.3d 1114, 1125 (7th Cir.) ("[The plaintiffs'] withdrawal from participation in the trusts helped create the financial crisis that resulted in the Coal Act."), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 490 (2d Cir.) ("By . . . 'orphaning' its retirees . . ., LTV became a prime contributor

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[2] In a futile effort to undermine the uniqueness of Eastern's situation, the UMWA states that "[m]any other companies subject to liability under the Coal Act . . . did not 'dump' beneficiaries into the UMWA Trusts . . . ." UMWA Br. 19. This reference is to companies which "continued making contributions to the UMWA Trusts through February 1, 1993." *Id.* These companies are the true beneficiaries of the Coal Act—1988 NBCWA signatories which, like EACC, saved millions of dollars a year in reduced UMWA retiree benefit costs. The attempt to compare Eastern, which as been saddled with approximately $100 million in unexpected Coal Act liability, with the post-1988 signatories is therefore fatuous. Not surprisingly, none of these companies has challenged the constitutionality of the benefits granted to them under the Coal Act.

to the financial crisis in the Benefit Trusts.."), *cert. denied*, 116 S. Ct. 298 (1995). Moreover, since the UMWA plans operated on a fully-funded "pay as you go" basis (at the insistence of the UMWA), Pet. at 4 n.3, the plans were fully-funded at the time of Eastern's departure in 1965.

It is true, as Respondents note, that the First Circuit concluded that Eastern's participation in the UMWA plans implicitly contributed to the miners' expectation of lifetime health benefits. *See* Pet. Br. A-13. Whatever implicit contribution Eastern may have made to an expectation of lifetime benefits prior to 1965, however, has no bearing on the inability of the UMWA funds to meet their obligations in the 1990s or the perceived necessity for legislative relief. It was not the implicit creation of expectations of lifetime benefits by Eastern or anything related to these expectations that led to the financial crisis in the UMWA funds. That crisis, rather, was caused primarily by withdrawing employers "dumping" their employees into the pool of eligible beneficiaries without ensuring continued contributions—something that Eastern never did.[3] The same can be said of the allegation that Eastern "profited" from the "labor peace" and other advantages supposedly accruing to Eastern based on its participation in the UMWA benefit plans. Simply put, none of this has anything to do with the financial crisis in the UMWA funds. Congress enacted the Coal Act because the funds were running out of money; the

[3] As Eastern noted in its Petition, neither the Government nor the UMWA submitted affidavits or sought discovery concerning EACC's succession to Eastern's coal-related assets and liabilities. Pet. 6 n.4. In its Brief in Opposition, Peabody attempts to contest certain facts related to that issue. Peabody Br. 2-9. Neither court below, however, addressed these apparent factual disputes, nor did either decide whether Peabody has standing to raise them in this action.

existence of labor peace did not contribute in any way to the financial crisis in the funds.

In addition, it goes without saying that any employer benefits from its employees' labor. And, of course, Eastern paid for that labor both through wages and through contributions to the UMWA funds; the miners therefore "profited" from their labor as well. But if the mere fact that an employee worked at some point for an employer is sufficient to sustain retroactive legislation against a due process challenge, then there is literally no limit to the obligations that could be retroactively imposed on employers for the benefit of employees, however short the employees' employment may have been, however long ago it may have terminated, and however unrelated the employer is to the need for the legislation.[4] As *Turner Elkhorn* makes clear, that is not the law.

[4] Peabody and the UMWA both note that from the 1966 to 1987 Eastern received dividends from its wholly-owned subsidiary, EACC. Fed. Br. 15; Peabody Br. 5. Peabody argues that the receipt of these funds links Eastern to the coal industry and somehow provides justification for Eastern's Coal Act liability. Peabody Br. 5-6. This observation ignores the central fact that EACC's dividend payments in no way contributed to the UMWA funds' financial crisis. In fact, between 1966 and 1987 EACC contributed over $233 million to the fund—a substantial portion of which Eastern presumably could have taken as further dividends had it abandoned its retirees and set up a non-UMWA subsidiary as its Coal Division's successor. JA 2626. Moreover, the dividends derived from EACC were simply consideration for the transfer of an enormous quantity of coal-related assets that took place when EACC was created, a transfer for which Eastern received only stock at the time. And as for the notion that Eastern's status as a parent justifies imputing EACC's actions to it, the short and sufficient answer is that no party in this case has alleged that the corporate veil between EACC and Eastern should be pierced, nor has Congress seen fit to do so statutorily. Under ordinary corporate law principles, then, EACC and Eastern must be treated as the distinct corporate entities that they were between 1966 and 1987.

Finally, Respondents claim that Eastern's Coal Act liability is constitutional because Eastern "directly contributed to the Combined Fund's liability by providing service credits to [its] former employees . . . ." Fed. Br. 14 (internal quotations omitted); *see also* UMWA Br. 14. Relying on *Concrete Pipe,* Respondents contend that these service credits created an entitlement to future benefits, and "[i]t was therefore proper for Congress to require all the coal operators who had contributed to the liabilities of the benefit funds to pay some of the cost of restoring the financial stability of the health care system." Fed. Br. 15. In *Concrete Pipe*, however, the pension plan guaranteed eligibility for a predetermined level of vested benefits, and the departure of the employer indeed contributed to the plan's future liability. *See Concrete Pipe & Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif.*, 508 U.S. 602, 637-38 (1993). But the concept of "vested benefits" and "unfunded liabilities," perfectly sensible in a case like *Concrete Pipe*, has no application to the UMWA funds during all the years that Eastern contributed to those funds for the simple reason that the two crucial elements of the "unfunded liabilities" concept in *Concrete Pipe*—predefined benefit levels and the possibility of vesting—were absent from the UMWA funds until 1974 at the earliest.

Despite repeated efforts to equate the Coal Act, as applied to Eastern, to the statutes in *Concrete Pipe* and *Turner Elkhorn*, the liability imposed by those statutes is fundamentally different, because in those cases the liability arose as a consequence of burdened party's conduct. *See id.* at 641. It is the absence of any such causal conduct by Eastern in engendering the funding crisis that led to the enactment of the Coal Act that raises serious doubt regarding

the application of the Coal Act to Eastern.[5]

II. TAKINGS ANALYSIS.

The thrust of Eastern's Takings Clause argument is twofold: (1) no "proportionality" can possibly exist between Eastern and its liability under the Coal Act where Eastern had nothing to do with the financial crisis that engendered that Act; and (2) the Coal Act's irrational assignment of liability to Eastern was unforeseeable and therefore interfered with Eastern's reasonable investment-backed expectations. The first point has been addressed above in connection with the due process issues. Respondents distort the second point beyond recognition by taking the view that if *some* federal involvement in the coal industry was foreseeable, then *no* federal involvement of any nature can possibly constitute a

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[5] The Respondents make two other arguments in support of the rationality of Eastern's Coal Act liability that are easily dispatched. Contrary to the Respondents' arguments, if Eastern's challenge to its Coal Act liability is successful, the responsibility for paying for the beneficiaries will not automatically shift to EACC, UMWA Br. 24; Peabody Br. 13, or "to other operators who had never employed those miners." Fed. Br. 17. Eastern's beneficiaries would be assigned in accordance with the terms of the Coal Act, and if none of Eastern's beneficiaries worked for EACC, UMWA Br. 15, then the reassignments will not have an impact on EACC. The miners will go to other signatory operators, their successors or will be designated as "unassigned beneficiaries." UMWA Br. 12 n .9. And, as noted by the UMWA, no assigned operator has had to pay an unassigned beneficiaries premium. *Id.* at 13-14. Furthermore, respondents wrongly state that the Coal Act takes account of differences in responsibility for the fiscal crisis by ensuring that companies like Eastern will never be assigned a retiree if a 1978 (or more recent) NBCWA signatory which employed retiree still exists. *See* Fed. Br. 16-17; UMWA Br. 22. For example if a retiree worked one day in 1968 for Company A, a currently active, pre-1978 signatory operator, for 22 months in 1966 and 1967 for Company B, a currently active post-1988 signatory operator, and twenty-two months and one day for Eastern in 1964 and 1965, the Coal Act dictates that Eastern be assigned responsibility for the retiree's health benefits. *See* JA 1581-82 (SSA Pub. No. 68-0101402—interpreting the Coal Act's priority rules.)

taking, thus effectively writing this prong of Takings Clause analysis out of existence.

In the Government's view, once *some* federal involvement in an industry is foreseeable (which is true of virtually every major industry in the United States), it does not matter what form the "eventual statutory scheme" takes, nor does it matter whether the nature or extent of the liability actually imposed was foreseeable; no taking will have occurred. Fed. Br. 19-21. This radical proposition would make it nearly impossible to conduct business in the United States, and it is therefore not surprising that, in fact, the test is not what the Government suggests.

The "investment-backed expectations" inquiry asks whether a burdened party, such as Eastern, had any right to rely on a particular state of the law and to assume that its business decisions would turn out in a particular way, in light of what a reasonable person would have expected or foreseen at the relevant time. *See generally, Concrete Pipe*, 508 U.S. at 645-46. As of 1966, Eastern had restructured its operations precisely because its ability to raise capital depended, in part, on the assurance that Eastern was insulated from coal-related liabilities. In early 1987, Eastern had been out of the coal business for over 20 years, but its independent subsidiary, EACC, was still an active coal mining concern. Assuming Eastern had been prescient enough to consider the impending crisis in the UMWA funds, it might have foreseen that were Congress to intervene to avert this crisis, Eastern, as EACC's parent corporation, could share liability with EACC for the benefits that EACC had promised. But Eastern surely could not have expected that it would have retained that liability after transferring all of EACC's stock to Peabody Holding Co. in 1987. Indeed, Eastern contemplated, and specified to EACC and Peabody

during the negotiations, that "Eastern's coal-related liabilities (known and unknown) would remain with EACC." JA 216-17. Every legal principle Eastern might have relied upon in assessing that issue would have led to the same conclusion.[6]

Had Eastern anticipated federal intervention in some impending funding crisis, Eastern might have wanted to see how Congress was likely to respond. It then would have looked for further guidance to the best "model" available—a statute that courts have called "identical to the character" of the Coal Act, *Blue Diamond*, 79 F.3d at 526—namely, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). *See generally, Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 724-25 (1984). Had Eastern turned for guidance to the MPPAA to assess how a transaction such as the sale of EACC to Peabody would be treated, it would have found (i) that a parent and a subsidiary are treated as a single employer for purposes of withdrawal liability under the "common control" test of the Employee Retirement Income Security Act of 1974 (ERISA), *see* 29 U.S.C. § 1301(b)(1); and (ii) that the sale of a subsidiary does not constitute a "withdrawal" which triggers withdrawal liability, *see* 29 U.S.C. § 1384(a). Under the approach adopted in the MPPAA, therefore, Eastern would not bear any liability so long as its former subsidiary continues to make contributions required under the statute.

Thus, having examined the MPPAA, Eastern

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[6] Under common law principles of corporate successorship and contract law, EACC assumed all of Eastern's coal-related liabilities by 1966, and the subsequent sale of all of EACC's stock to Peabody would normally transfer all of EACC's liabilities. Those principles, then, would have led Eastern to believe that it would successfully transfer all coal-related liabilities by selling EACC's stock to Peabody.

reasonably would have expected that it would not bear primary liability for coal-related obligations after transferring all of EACC's stock to Peabody. Congress' departure in the Coal Act from the rational scheme contained in the MPPAA, and its disregard of ordinary common law principles regarding corporate successorship, was not foreseeable, and wreaked havoc on the investment-backed expectations that Eastern reasonably held in planning and executing the sale of EACC to Peabody.

Thus, the Coal Act interfered in an unforeseeable manner with Eastern's investment-backed expectations. Because the court of appeals relied so heavily on a distorted view of this critical factor, this Petition presents an opportunity to reject the proposition that a general history of federal involvement in an industry is sufficient to justify virtually any retroactive liability—even an unanticipated liability arising out of conduct that occurred more than a generation ago.

Conclusion

For the additional reasons set forth above, Eastern's Petition for a Writ of Certiorari should be granted.

JOHN T. MONTGOMERY
Counsel of Record
ROBERT DANIEL O'CONNOR
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioners

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EASTERN ENTERPRISES,
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KENNETH S. APFEL, COMM'R OF SOCIAL SECURITY, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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JOHN T. MONTGOMERY
Counsel of Record
Ropes & Gray
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioner

SETH P. WAXMAN
Solicitor General
of the United States
Department of Justice
950 Penn. Ave., N.W.
Washington, D.C. 20530
(202) 514-2217
Counsel for The Federal Respondent

KENNETH A. SWEDER
Counsel of Record
Stroock & Stroock & Lavan
100 Federal St. 33d Floor
Boston, MA 02110
(617) 482-6800
Counsel for Third Party Respondents Peabody Holding Co., Inc., et. al.

PETER BUSCEMI
Counsel of Record
Morgan, Lewis & Bockius LLP
1800 M. St., N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Respondents UMWA Combined Benefit Fund and Its Trustees

PETITION FOR WRIT OF CERTIORARI FILED JULY 3, 1997
CERTIORARI GRANTED OCTOBER 20, 1997

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The following opinions, judgments, orders and public law have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari or in the Appendix included in the Brief for Respondents the UMWA Combined Benefit Fund and its Trustees in Opposition.

Opinion, *Eastern Enterprises* v. *Shirley S. Chater, et al.*, 110 F.3d 150 (CA1 1997) A-1

Judgment, United States District Court for the District of Massachusetts, Allowing Defendants' Motions for Summary Judgment July 8, 1996 ..... A-24

Order, United States District Court for the District of Massachusetts, Denying Plaintiff's Motion for Summary Judgment on the Constitutional Claim and Allowing Defendants' Cross-Motions for Summary Judgment on the Constitutional Claim, June 29, 1996 ..... A-25

Order, United States District Court for the District of Massachusetts, Denying Plaintiff's Motion for Summary Judgment on the Statutory Claim and Denying Third Party Defendants' Motion to Dismiss , 942 F. Supp. 684, Mar. 30, 1996 ..... A-28

Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Title XIX, Subtitle C, 106 Stat. 3036 (1992) 1a*

* This item is found in the Appendix included in the Brief for Respondents the UMWA Combined Benefit Fund and its Trustees in Opposition.

RELEVANT DOCKET ENTRIES
United States District Court for the District of Massachusetts
(No.93-CV-12372)

11/1/93	1	Complaint filed (bdb) [Entry date 11/02/93]
11/1/93	65	Motion by Eastern Enterprises for temporary restraining order , filed. (jdj) [Entry date 08/07/95]
11/5/93	2	Response by United Mine Workers in opposition to motion for TRO. (jdj) [Entry date 11/08/93]
11/26/93	6	STIPULATION by Eastern Enterprises, Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers.cc/cl (see stipulation for detail) (jdj)
12/15/93	7	Answer to Complaint by United Mine Workers (jdj)
12/17/93	8	STIPULATION by Eastern Enterprises, Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers regarding amended complaint. (jdj) [Entry date 12/29/93]

12/27/93	9	Answer by Eastern Enterprises to counterclaim of the Combined Benefit Fund and its trustees. FILED c.s. (jmr) [Entry date 12/29/93]
1/10/94	10	Third-party complaint by Eastern Enterprises against Peabody Holding CO., Eastern Associated, Coal Properties Corp (jdj)
2/14/94	13	Motion by Peabody Holding CO., Eastern Associated, Coal Properties Corp to dismiss third party complaint (jdj)
2/14/94	14	Memorandum by Peabody Holding CO., Eastern Associated, Coal Properties Corp in support of [13-1] motion to dismiss third party complaint (jdj)
2/14/94	15	Affidavit of T.S. Hilton Re: [13-1] motion to dismiss third party complaint (jdj)
3/8/94	17	Status report filed by Eastern Enterprises, Donna E. Shalala (jdj)
3/22/94	20	Response by Eastern Enterprises in opposition to [13-1] motion to dismiss third party complaint (jdj)
12/19/94	25	Joint Status report by Eastern Enterprises, Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, Doe, United Mine Workers , filed. (jdj)

12/19/94	26	Status report by Eastern Enterprises, Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers , filed. (jdj) [Entry date 12/20/94]
1/18/95	28	Judge Mark L. Wolf . Clerk's Notes: re: status conference held, parties to submit proposed schedule by 1/25/95, amended complaint due 2/15/95, brief on APA issues due 3/15/95 defts response due 4/15/95,plaintiffs replys due 4/28/95 set status conference for 10:00 5/19/95 before Judge Mark L. Wolf Court Reporter: (jdj) [Entry date 01/25/95]
1/31/95	31	Judge Mark L. Wolf . Scheduling Order entered setting plaintiffs amending of complaint on 2/15/95 Deadline for filing of plaintiffs S/J motions 3/15/95, responses due 4/28/95 Status conference set for 10:00 5/19/95 . cc/cl (jdj)
2/15/95	32	Amended complaint by Eastern Enterprises filed. (Answer due 2/25/95 for Coal Properties Corp, for Eastern Associated, for Peabody Holding CO., for United Mine Workers, for John Doe, for Gail R. Wilensky, for Carlton R. Sickles, for Elliott A. Segal, for Thomas O.S. Rand, for Marty D. Hudson, for Joseph P. Connors Sr., for Donna E. Shalala) . Amended complaint amends [1-1] complaint ; adding . (jdj) [Entry date 02/21/95]

3/3/95	34	Answer by Donna E. Shalala to amended complaint, filed. (jdj)
3/7/95	35	Answer by United Mine Workers to amended complaint, filed. (jdj)
3/16/95	36	Motion by Eastern Enterprises for summary judgment, filed. (jdj)
3/16/95	37	Memorandum by Eastern Enterprises in support of [36-1] motion for summary judgment , filed. (jdj)
3/16/95	38	Statement of Facts by Eastern Enterprises re: [36-1] motion for summary judgment , filed. (jdj)
3/16/95	39	Eastern Enterprises exhibits in support of it statement of material facts (volume 1) (jdj)
3/16/95	40	Eastern Enterprises exhibits in support of its statement of material facts. (volume 2) (jdj)
3/16/95	41	Eastern Enterprises exhibits in support of its statement of material facts. (volume 3) (jdj)
4/18/95	42	Memorandum by Donna E. Shalala in opposition to [36-1] motion for summary judgment, filed. (jdj)
4/18/95	43	Response by United Mine Workers to plaintiffs statement of facts , filed. (jdj)
4/18/95	44	Affidavit of Edward Gleason, filed. (jdj)

4/18/95	45	Response by Peabody Holding CO., Eastern Associated, Coal Properties Corp in opposition to [36-1] motion for summary judgment, filed. (jdj)
4/18/95	46	Affidavit Kenneth Sweder, re: [45-1] opposition response, filed. (jdj)
4/18/95	47	Statement of Facts by Eastern Associated re: [36-1] motion for summary judgment, filed. (jdj)
4/18/95	48	Response by Donna E. Shalala et al in opposition to [36-1] motion for summary judgment, filed. (jdj)
4/18/95	49	Response by Donna E. Shalala et al to Eastern Enterprises statement of material facts, filed. (jdj)
4/18/95	50	Declaration of Donna E. Shalala et al, re: [48-1] opposition response, filed. (jdj)
5/1/95	51	Reply by Eastern Enterprises to response to [36-1] motion for summary judgment, filed. (jdj)
7/10/95	56	Motion by Eastern Enterprises to supplement the record in support of S/J on statutory interpretation claims, filed. (jdj)

7/10/95	57	Memorandum by Eastern Enterprises in support of [56-1] motion to supplement the record in support of S/J on statutory interpretation claims, filed. (jdj)
7/10/95	58	Affidavit of William Elias, re: [56-1] motion to supplement the record in support of S/J on statutory interpretation claims, filed. (jdj)
7/21/95	60	Motion of Shirley Chater to extend time to 7/28/95 to supplement record, filed. (jdj)
7/28/95	61	Motion by Peabody Holding CO., Eastern Associated, Coal Properties Corp for leave to file supplemental brief, filed. (jdj)
7/28/95	62	Supplemental Brief by Peabody Holding CO., Eastern Associated, Coal Properties Corp in opposition to [36-1] motion for summary judgment, filed. (jdj)
7/31/95	63	Response by Donna E. Shalala to [56-1] motion to supplement the record in support of S/J on statutory interpretation claims , filed. (jdj)
7/31/95	64	Affidavit of Marilyn O'Connell , re: [63-1] motion response, filed. (jdj)

8/2/95	–	Judge Mark L. Wolf . Endorsed Order entered granting [60-1] motion to extend time to 7/28/95 to supplement record .cc/cl (jdj)
8/7/95	68	Judge Mark L. Wolf . Notice of Hearing/conference: Motion hearing set for 2:00 9/28/95 for [36-1] motion for summary judgment . cc/cl (jdj) [Entry date 08/08/95]
8/8/95	67	Reply by Eastern Enterprises to response to [56-1] motion to supplement the record in support of S/J on statutory interpretation claims , filed. (jdj)
8/9/95	69	Response by Eastern Enterprises to [61-1] motion for leave to file supplemental brief, filed. (jdj)
9/8/95	71	Motion by Eastern Enterprises for leave to file supplemental memorandum w/regard to new coal act regulations, filed. (jdj)
9/8/95	72	Memorandum by Eastern Enterprises in further support of, summary judgment on the statutory interpretation claims in light of new SSA regulations filed. (jdj)
9/21/95	76	Motion by SSA to extend time to 9/22/95 to respond to memo by Eastern, filed. (jam) [Entry date 09/22/95]

9/22/95	75	Supplemental Memorandum by Peabody Holding CO., Eastern Associated, Coal Properties Corp in opposition to [72-1] support memorandum , filed. (jam)
9/25/95	77	Memorandum in opposition by Shirley S. Chater to [71-1] motion for leave to file supplemental memorandum w/regard to new coal act regulations, filed. (jam) [Entry date 09/26/95]
10/10/95	79	Reply by Eastern Enterprises to response to [71-1] motion for leave to file supplemental memorandum w/regard to new coal act regulations, filed. c/s. (cjn) [Entry date 10/13/95]
10/10/95	80	Motion by Eastern Enterprises for leave to file response to Federal Defendants Opposition to motion for leave to file supplemental Memorandum with Regard to New Coal Act Instructions, filed. c/s. (cjn) [Entry date 10/13/95]
10/26/95	81	Judge Mark L. Wolf . Notice/order entered cancelling deadline. Deadline terminated: hearing. It has been rescheduled for 11/30/95 at 2:30. cc/cl. (cjn)
11/16/95	82	Notice of cancellation, Hearing scheduled for November 30, 1995 has been cancelled. It has been rescheduled for January 9, 1996 at 2:30, filed. c/s. (cjn) [Entry date 11/20/95]

12/6/95	83	Judge Mark L. Wolf . Notice/order entered cancelling deadline. Deadline terminated: rescheduled for 1/25/96 at 2:30. cc/cl. (cjn)
12/15/95	84	Letter by John T. Montgomery dated: 12/15/95 to: Ms. Lovett re: schedule filed. c/s. (cjn) [Entry date 12/19/95]
2/1/96	–	Scheduling conference held . (cjn) [Entry date 02/09/96]
2/1/96	90	Judge Mark L. Wolf . Clerk's Notes: re: conference held denying [36-1] motion for summary judgment, denying [13-1] motion to dismiss third party complaint. Parties stipulated protective Order is allowed. John R. Mooney Admitted pro hac vice Court Reporter: Jim McLaughlin (cjn) [Entry date 02/09/96]
2/9/96	93	Motion by Eastern Enterprises for summary judgment on constitutional claims, filed. c/s. (cjn) [Entry date 02/13/96]
2/13/96	94	Judge Mark L. Wolf . Adopted Scheduling Order entered, reset motion filing deadline summary judgment for 2/9/96, Response to motion reset to 3/1/96 for [93-1] motion for summary judgment and or serve cross motion for summary judgment on The Constitutional claims. The Federal Defendant and the United Mine Workers combined Benefit Fund have until 3/1/96 to serve proposed forms of order with respect to resolution of the

		pending motions for summary judgment. Eastern may serve on or before 3/4/96 Opposition to any Cross Motion for summary judgment... Any other party serve by 32/7/96 a reply to Opposition filed by Eastern as above. Any party shall be permitted, but not required, to submit any further memorandum of law in support of or opposition to any pending motion for summary judgment. Eastern and 3dpty Defendants will serve a proposed discovery schedule by 3/4/96. cc/cl. (cjn) [Entry date 02/16/96]
3/1/96	95	Memorandum by Peabody Holding CO. in opposition to [93-1] motion for summary judgment on constitutional claims, filed. c/s. (cjn) [Entry date 03/05/96]
3/4/96	96	Cross motion by Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers for summary judgment on constitutional issues, filed. c/s. (cjn) [Entry date 03/05/96]
3/4/96	97	Memorandum by Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers in support of [96-1] cross motion for summary judgment on constitutional issues, filed. c/s. (cjn) [Entry date 03/05/96]

3/4/96	98	Affidavit Russel Crosby, re: [97-1] support memorandum, [96-1] cross motion for summary judgment on constitutional issues, filed. c/s. (cjn) [Entry date 03/05/96]
3/4/96	100	Memorandum by Eastern Enterprises in opposition to [96-1] cross motion for summary judgment on constitutional issues, filed. Proposed Order attached. c/s. (cjn) [Entry date 03/06/96]
3/5/96	101	Memorandum by Shirley S. Chater in opposition to [96-1] cross motion for summary judgment on constitutional issues, [93-1] motion for summary judgment on constitutional claims, filed. c/s. (cjn) [Entry date 03/13/96]
3/18/96	104	Answer by Peabody Holding CO., Eastern Associated, Coal Properties Corp to [10-1] third-party complaint, filed. c/s. (cjn) [Entry date 03/22/96]
3/30/96	106	Judge Mark L. Wolf . Memorandum and Order entered. denying [93-1] motion for summary judgment on constitutional claims denying [13-1] motion to dismiss third party complaint. cc/cl. (cjn) [Entry date 04/01/96]

7/24/96	111	Judge Mark L. Wolf . Judgment entered for Donna E. Shalala, Joseph P. Connors Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky, John Doe, United Mine Workers against Eastern Enterprises . cc/clc. (cjn) [Entry date 07/25/96]
8/5/96	115	Notice of appeal by Eastern Enterprises filed. Appeal record due on 9/4/96 (mmh) [Entry date 08/08/96]
5/30/97	116	Mandate of US Court of Appeals re: affirming . (mmh)

RELEVANT DOCKET ENTRIES
United States Court of Appeals for the First Circuit
(No. 96-1947)

9/5/96	CIVIL case docketed. [240462-1] Notice filed by Ellen Solomon-Gonzales for Appellant Eastern Enterprises, John T. Montgomery for Appellant Eastern Enterprises. (bety)
9/5/96	RECORD ON APPEAL filed: 1 volume(s). Appellant's Brief Due 10/10/96. (bety)
9/13/96	MOTION filed for Appellant Eastern Enterprises requesting caption change entered on docket. (bety)
9/13/96	ORDER: by Judge Norman H. Stahl. Upon consideration of motion of Appellant, it is ordered that the above-captioned appeal be amended to read as stated in said order. (bety)

10/18/96	APPELLANT'S BRIEF and 4 volumes of APPENDIX filed on behalf of Eastern Enterprises. Pages: 50, Copies: 10, delivered by mail, filed. Certificate of service date 10/17/96. (bevy)
10/18/96	MOTION filed for Appellant Eastern Enterprises requesting to file substituted brief. (bety)
10/22/96	ORDER: by Judge Michael Boudin granting motion to file substituted brief. (bety)
10/22/96	CORRECTED BRIEF filed on behalf of Appellant Eastern Enterprises. Pages: 50, Copies: 10, delivered by mail, filed. Certificate of service date . (bety)
12/9/96	BRIEF filed by Kenneth A. Sweder for Appellees Peabody Holding Company, Inc Et Al. Copies: 10. Certificate of service date 12/9/96. (bevy)
12/12/96	BRIEF filed by Sushma Soni for Appellees Shirley S. Chater. Copies: 10. Certificate of service date 12/9/96. (bevy)
12/12/96	BRIEF filed by Appellees The UMWA Combined Benefit Fund and Its Trustees. Copies: 10. Certificate of service date 12/9/96. (bevy)
12/31/96	APPELLANT'S REPLY BRIEF on behalf of Eastern Enterprises. Pages: 24. Copies: 10. Delivered by hand. Certificate of service date 12/30/96. (bety)

4/7/97	JUDGMENT: Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Judge Bruce M. Selya, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. published pages: 26 (bety)
5/30/97	MANDATE ISSUED. Taxation of costs filed. (bety)
7/9/97	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 7/3/97. Supreme Court case number: 97-42. (bety)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 93-12372-MLW

Eastern Enterprises,

Plaintiff,

V.

Donna E. Shalala, Et Al.,

Defendants.

THIRD PARTY COMPLAINT

INTRODUCTION

Eastern Enterprises ("Eastern") seeks a declaratory judgment that Peabody Holding Co., Inc. ("Peabody"), Eastern Associated Coal Corp. ("EACC") and Coal Properties Corp. ("CPC") are obligated, by contract, by common-law and by basic notions of fairness, to pay any liability which may be imposed on Eastern by the Coal Industry Retiree Health Benefit Act, 26 U.S.C. § 9701 et seq., ("the Coal Act").

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 2201. It also has jurisdiction under the doctrine of ancillary jurisdiction.

2. Venue of this action lies in the District of Massachusetts pursuant to 28 U.S.C. §§ 1391 (a), (b) and (c).

PARTIES

3. Eastern is a Massachusetts business trust with its principal place of business in Weston, Massachusetts.

4. Peabody is a New York Corporation with its principal place of business in St. Louis, Missouri.

5. CPC is a Delaware Corporation. Upon information and belief, it primarily functions as a holding company. CPC is owned, directly or indirectly, by Peabody.

6. EACC is a Delaware Corporation with its principal place of business in Weston, West Virginia. EACC is owned, directly or indirectly, by Peabody.

FACTS

Eastern Transfers Its Coal Operations to CPC

7. As of 1950, Eastern was engaged in coal mining operations in West Virginia, Pennsylvania and Kentucky. Certain employees at its coal mining operations were represented by the United Mine Workers of America ("UMWA").

8. In 1950, through its membership in the Bituminous Coal Operators Association ("BCOA"), Eastern signed the 1950 National Bituminous Coal Wage Agreement ("1950 NBCWA"), the first in a series of agreements to provide funds for certain retirement and other benefits to be provided to miners and others. Through its membership in the BCOA, Eastern was a signatory to various amendments to the 1950 NBCWA, including the 1951, 1952, 1955, 1956, 1958 and 1964 amendments.

9. In 1963, Eastern began transferring its coal mining operations, including its liabilities, to an independent, operating subsidiary named Eastern Associated Coal Corp. ("EACC"). Subsequently, another subsidiary was created, Coal Properties Corp. ("CPC"), to which Eastern transferred EACC's stock.

10. Eastern completed the transfer of its coal-related assets and liabilities to EACC by January 1, 1966, and as of that date, EACC had assumed all present and future liabilities of Eastern arising out of or relating to Eastern's coal mining and marketing operations (with the exception of several leases for which Eastern remained responsible along with EACC). From that date forward, EACC actively fulfilled all coal-related liabilities for which Eastern would have been liable absent the transfer of liabilities to EACC.

Peabody, EACC and the Other BCOA Members Promise Miners New Benefits

11. During the years after 1966, the UMWA and the mine operators who were members of the BCOA negotiated new National Bituminous Coal Wage Agreements ("NBCWAs"). Partly in response to the enactment of ERISA in 1974, the BCOA and the UMWA created a new set of Pension Trusts and Health Benefit Plans. The 1974 NBCWA created the UMWA 1950 Pension Trust ("1950 Pension Trust") and transferred to it the assets of the 1950 W&R Fund. The 1974 NBCWA also created three new plans: the 1974 Pension Trust and two Health Benefit Plans; the UMWA 1950 Benefit Plan and Trust ("1950 Health Benefit Plan"); and the UMWA 1974 Benefit Plan and Trust ("1974 Health Benefit Plan"). The Health Benefit Plans provided health and other benefits to retired coal miners (the 1950 Health Benefit Plan for miners who retired before January 1, 1976 and the 1974 Health Benefit Plan for miners who retired after January 1, 1976).

12. The 1974 NBCWA changed the manner in which signatory employers made contributions. All of the assets of the 1950 W&R Fund – including all of the contributions of Eastern – were transferred to the 1950 Pension Fund. The 1974 Pension Fund, and the Health Benefit Plans, were established without reserves, but were financed with contributions from signatory employers commencing on the effective date of the 1974 NBCWA.

13. The 1974 NBCWA also changed the class of beneficiaries entitled to benefits by greatly expanding it. Prior to the 1974 NBCWA, only "Widows of Men Killed in Mines" were entitled to "[c]ontinuation of hospital and medical coverage." 1971 NBCWA. The 1974 NBCWA provided, by contrast, that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage." 1974 NBCWA.

14. The UMWA and the BCOA negotiated another new NBCWA in 1978 ("1978 NBCWA"). The 1978 NBCWA modified the Health Benefit Plans created in 1974. The Agreement required that health benefits for miners who retired after January 1, 1976 be provided by individual plans of signatory operators (rather than the 1974 Health Benefit Plan), and that the 1974 Health Benefit Plan be used exclusively to provide health benefits to miners who retired after January 1, 1976 and whose operators were "no longer in business." 1978 NBCWA.

15. In negotiations for the 1978 NBCWA, the UMWA and the BCOA agreed to a "guarantee" clause which provided:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

16. The "guarantee" clause obligates signatory operators, for the first time, to make sufficient contributions to assure payment of health and other benefits provided by the 1950 Health Benefit Plan and the 1974 Health Benefit Plan. Prior to 1978, no signatory coal operator had any obligation to make up any deficits, and no right to demand any particular benefits for its miners in the benefit programs of the 1950 and 1974 Health

Benefit Plans, or their predecessor, the 1950 W&R Fund. Prior to 1978, signatory coal operators agreed to contribute at a set rate based on tons of coal mined, but they did not guarantee that those contributions would be sufficient to assure payment of any particular level or particular kind of health benefits to beneficiaries.

17. As a result of negotiations leading to the 1978 NBCWA, the Plan documents for the 1950 and 1974 Health Benefit Plans, which were incorporated by reference into the 1978 NBCWA, included, for the first time, what is known as the "Evergreen Clause." The "Evergreen Clause" reads:

> Any Employer who employed any Participant eligible for coverage under, or who received or receives benefits under, the 1950 [1974] Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 [1974] Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 [1974] Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.

1950 Health Benefit Plan (February 1988). The "Evergreen Clause" has been interpreted to mean that the signatories to the 1978 NBCWA obligated themselves to continue making contributions to the 1950 and 1974 Health Benefit Plans notwithstanding their subsequent withdrawal from the BCOA or the expiration of other contractual obligations to the UMWA.

18. In negotiations for the 1978 NBCWA, the UMWA and the BCOA also agreed to give the BCOA the unilateral authority to increase contribution rates as necessary to fully fund benefits.

19. Successive NBCWAs were negotiated (in 1981, 1984, and 1988) between the UMWA and those operators that were members of the BCOA, in which contribution rates were increased.

20. In negotiations for the National Bituminous Coal Wage Agreement of 1988 ("1988 NBCWA"), the UMWA and the operators which were members of the BCOA agreed that if any signatory employer's contributions to the 1950 or 1974 Health Benefit Plan ceased for any reason, the signatory would be obligated to pay withdrawal liability.

21. Eastern avers, upon information and belief, that the cumulative effect of the various changes negotiated by the UMWA and the BCOA, was to transform the 1950 Fund, to which Eastern had once contributed, from a plan of limited contributor liability, under which the parties agreed that contributors would be obligated to make only such periodic contributions as were fixed by contract and would not be liable for further contributions if benefit costs outstripped accumulated plan funds, to plans which provided for potentially unlimited liability for the future costs of specified benefits. Eastern was never associated with such a plan and never agreed to any such obligations.

22. Eastern avers, upon information and belief, that as a result of the increased levels of benefits promised and paid by the 1950 and 1974 Health Benefit Plans, the change in the funding formula from tonnage-based to hours-based, the decreased revenues caused by increased worker productivity and fewer man hours worked, the expansion of the class of beneficiaries and, most notably, the failure of the BCOA to increase contribution rates for signatory operators, the 1950 Health Benefit Plan experienced its first deficit in 1988, and the 1974 Health Benefit Plan experienced its first deficit in 1990.

23. Upon information and belief, Peabody and EACC were closely associated with such plans and agreed, again and again, through BCOA throughout the years after 1966 to provide

miners with the benefits set forth in the various NBCWAs. Eastern, in contrast, has not been signatory to any collective bargaining agreement with the UMWA since the 1964 Amendment.

Peabody Acquires CPC and Its Liabilities

24. Peabody acquired CPC (and, accordingly, CPC's subsidiary, EACC) in 1987 by acquiring all of the common stock of the company from Eastern. A Peabody subsidiary acquired all of CPC's preferred stock.

25. By structuring the sale as a stock transaction, Peabody knowingly and intentionally assured that CPC and EACC's liabilities (including the liabilities assumed from Eastern) remained with EACC and CPC. Peabody was a sophisticated corporation and was fully capable of weighing the advantages and disadvantages of acquiring CPC's shares rather than attempting simply to acquire its assets.

26. The sale documents, and the parties' interactions, confirmed that the obligations of CPC and EACC, including CPC's obligations to Eastern's, CPC's and EACC's present and former miners and their spouses and dependents, remained with EACC and CPC. These obligations included all obligations relating to the 1950, 1974 and subsequent NBCWAs.

27. The sale documents, and the parties' interactions, also established that Peabody was responsible for the obligations of CPC and EACC, including the obligations of CPC and EACC to Eastern's former miners.

28. The Stock Exchange Agreement, by which Peabody agreed to acquire the common stock of CPC, for example, provided in Section 5(c) that CPC, EACC or Peabody would be responsible for "payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c)." The plans listed on Schedule 5(c) included the "Benefit Plan for UMWA Represented Employees of EACC and Subs." Section 5(c) further provided that Peabody would be

responsible for making these payments and reimbursements "in respect to" "[t]he class of individuals" consisting of "(i) all persons who as of the Closing Date [of the Agreement] are employed by EACC, CPC or any other Subsidiary of CPC and (ii) all persons who prior to the Closing Date retired or otherwise ceased to be employed by CPC or any of its Subsidiaries (including EACC), exclusive of any such person who as of the Closing Date is employed by Eastern or by a Subsidiary of Eastern other than CPC and CPC's Subsidiaries."

29. Similarly, Schedule 2(r) attached to the Stock Exchange Agreement identified the employee benefit plans, collective bargaining agreements and similar plans or agreements to which CPC was required to make contributions. Schedule 2(r) identified, among other things, the 1950 UMWA Pension Trust, the 1950 UMWA Benefit Trust, the 1974 UMWA Pension Trust, the 1974 UMWA Benefit Trust and the NBCWA of 1984. Certain of these trusts directly benefited the former employees of Eastern.

The 1992 Coal Act

30. In response to the deteriorating financial condition of the 1950 and 1974 Health Benefit Plans, Congress drafted the Coal Act, which was signed on October 24, 1992, by President Bush as part of the Energy Policy Act of 1992. Eastern avers, upon information and belief, that the Coal Act guarantees continued lifetime health and death benefits to the approximately 114,000 UMWA retirees, surviving spouses, and dependents who were receiving benefits from the 1950 or 1974 Health Benefit Plans as of July 20, 1992.

31. The Coal Act, in effect, creates three classes of current and former coal mining industry employers:

(i) signatories to the 1988 NBCWA or a "me-too" agreement patterned after the 1988 NBCWA ("1988 Agreement Operators");

(ii) employers that did not sign the 1988 NBCWA, but were signatories to any pre-1988 NBCWA between 1950 and 1978 ("Reachback Companies"); and

(iii) employers that were never signatory to an NBCWA ("Non-signatory Employers").

32. Eastern avers, upon information and belief, that prior to the enactment of the Coal Act, the 1988 Agreement Operators were contractually required to satisfy the obligations of the 1950 and 1974 Health Benefit Plans including lifetime health benefits for the beneficiaries. The Coal Act guarantees the very lifetime health benefits that Operators had contracted to provide between 1974 and 1988, but assigns to all Reachback Companies, including those that signed neither the 1974 nor the 1978 Agreement, responsibility for making premium payments to fund those benefits.

33. Over and above the health benefits provided by the Coal Act, the Act purports to make Reachback Companies responsible for making premium payments sufficient to provide death benefits identical to those provided under the 1950 Pension Trust or 1974 Pension Trust as of July 20, 1992.

34. In order to administer and provide health and death benefits to retirees and their dependents to the same extent provided in the 1950 and 1974 Benefit Plans, Section 9702 of the Coal Act created the UMWA Combined Benefit Fund ("Combined Fund"). Further, the Coal Act provided for the merger of the 1950 and 1974 Benefit Plans into the Combined Fund.

35. The Coal Act divides beneficiaries of the Combined Fund, i.e. the former beneficiaries of the 1950 and 1974 Benefit Plans, into two groups: (i) assigned beneficiaries, i.e., those UMWA retirees who once worked for a 1988 Agreement Operator or a Reachback Company, and the spouses or certain dependents of those UMWA retirees; and (ii) unassigned beneficiaries, i.e., those UMWA retirees who worked for a company that no longer exists, but that once signed an

NBCWA at any time between 1950 and July 20, 1992, and the spouses or certain dependents of those retirees.

36. By Notices dated variously September 28, October 7, October 8, October 15, October 18, October 19, and October 22, 1993, Eastern was informed by the SSA that it had been assigned liability under the Coal Act for a total of approximately 2700 retired miners, surviving spouses, and dependents.

37. By Memorandum dated October 22, 1993 from the Trustees of the UMWA Combined Benefit Fund, Eastern was notified that it would be required to pay a monthly premium to the Combined Fund, beginning with the month of October 1993, of $421,109.18 for approximately 1400 retired miners and their dependents (reflecting an apparent adjustment in the number of beneficiaries assigned to Eastern).

38. The Memorandum sent by the Combined Fund states that the premiums payable for the period beginning October 1993 do not include any portion attributable to death benefits or unassigned persons, inasmuch as the costs of such coverage have been satisfied for the moment with funds transferred from the 1950 Pension Trust. Nevertheless, Eastern avers, upon information and belief, that notwithstanding this temporary relief, the Coal Act by its terms will require Eastern to contribute substantial additional premiums for death benefits and benefits for unassigned persons.

39. The Coal Act purports to require the Secretary to assign to Eastern as a Reachback Company both former employees (and spouses or dependents) and a percentage of unassigned beneficiaries. Consequently, if the assignments made by the Secretary are not withdrawn, Eastern could be liable for annual premiums in excess of $3 million to pay for health and death benefits with respect to former employees, their spouses and dependents and unassigned beneficiaries.

40. Eastern avers, upon information and belief, that under the provisions of the Coal Act, Eastern's financial obligations to

the Combined Fund would continue until there are no remaining retirees, surviving spouses, or dependents receiving health and/or death benefits from such Fund, which is anticipated to continue for thirty years or more. This would require Eastern to pay tens of millions of dollars into the Combined Fund.

41. Pursuant to applicable accounting standards, Eastern may well be required to immediately reflect on its financial reports the value of contributions that the Coal Act would require it to pay into the Combined Fund over the lifetime of that Fund. The effect of this would be to substantially reduce the net worth of Eastern and would result in a substantial loss for the fiscal year ending December 31, 1993.

42. Eastern is a Reachback Company which no longer operates bituminous coal mines. Upon information and belief, under the Coal Act, Eastern must pay premiums with respect to benefits for its former employees to whom it had never promised such benefits and also for an indeterminate number of unassigned individuals with whom Eastern has never had an employment relationship.

43. The liability purportedly applied to Eastern is one which was assumed by EACC and CPC. It relates to Eastern's coal operations and was, accordingly, transferred to EACC and CPC in 1966.

44. The liability purportedly applied to Eastern is one which was transferred to CPC and EACC. It was a liability assumed by EACC and CPC and remained with EACC and CPC when Peabody acquired those companies.

45. The Stock Exchange Agreement also provides that the liability purportedly applied to Eastern is one which Peabody, EACC and CPC are required to pay. That liability directly arises from payments of premiums and benefits, and for the reimbursement of benefit costs under the benefit plans for the UMWA covered employees for which EACC or CPC were liable under the benefit plans. As such, the Stock Exchange

Agreement provides, in Section 5(c) and elsewhere, that Peabody, EACC and CPC, not Eastern, shall be liable for such payments.

46. Basic notions of fairness and justice require that Peabody, EACC and CPC, and not Eastern, be responsible for the liability purportedly applied to Eastern by the Coal Act. Said liability arises from promises made, and not kept, by companies such as Peabody and EACC. Those companies committed to providing benefits to UMWA members, but failed to provide the funds necessary to supply those benefits. Eastern never agreed to provide such benefits. In fact, it has fully funded all benefits it committed to provide. It is unfair and unjust to require Eastern to, in effect, pay the debts of companies such as Peabody.

CAUSE OF ACTION

47. Eastern realleges the allegations contained in Paragraphs 1 through 46 of this Third Party Complaint as if fully set forth herein.

48. There exists an actual controversy between Eastern and the defendants regarding their obligation to pay any liability purportedly applied to Eastern by the Coal Act.

49. EACC, CPC and Peabody are obligated by reason of the 1987 Stock Exchange Agreement to pay any liability purportedly applied to Eastern by the Coal Act.

50. EACC, CPC and Peabody are obligated by basic equitable considerations to pay any liability purportedly applied to Eastern by the Coal Act.

51. EACC, CPC and Peabody are obligated by reason of their assumption of Eastern's coal-related liabilities to pay any liability purportedly applied to Eastern by the Coal Act.

PRAYER FOR RELIEF

WHEREFORE, Eastern Enterprises requests that this Court enter a judgment: (a) declaring that Peabody Holding Co., Inc., Eastern Associated Coal Corp. and Coal Properties Corp. are obligated to pay any liability which may be imposed on Eastern by the Coal Industry Retiree Health Benefit Act, 26 U.S.C. §9701 et seq.; and (b) granting Eastern such other and further relief as the Court may deem just and proper, including attorneys' fees and costs.

Respectfully submitted,

EASTERN ENTERPRISES,
by its attorneys,

/s/ Rosa C. Hallowell
William L. Patton, BBO #391640
John T. Montgomery, BBO #352220
David A. Martland, BBO #548700
Rosa C. Hallowell, BBO #561473
ROPES & GRAY
One International Place
Boston, Massachusetts 02110-2624
(617) 951-7000

Dated: January 5, 1994

(certificate of service omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Caption Omitted)

FIRST AMENDED COMPLAINT
PRELIMINARY STATEMENT

1. This is an action seeking relief, pursuant to 5 U.S.C. § 706, from a determination by the Secretary of Health and Human Services that Eastern Enterprises ("Eastern"), rather than its successor, Eastern Associated Coal Corp. ("EACC"), is obligated to provide lifetime health and death benefits, under the provisions of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), to certain retired coal miners (and certain other persons) who were employed by Eastern's former Coal Division between 1946 and 1965. Alternatively, Eastern seeks a declaratory judgment that the provisions of the Coal Act cannot be interpreted to require Eastern to provide such benefits. Finally, assuming that Eastern is liable to provide benefits under the Coal Act, Eastern seeks a determination that the Coal Act violates the Due Process and Takings Clauses of the Fifth Amendment of the U.S. Constitution.

2. The Coal Act, as interpreted by the Secretary, would (i) transfer obligations to Eastern, at a cost of $100 million, that arise under collective bargaining agreements that were executed long after Eastern left the coal industry in 1965, and (ii) relieve EACC, Eastern's successor, which assumed all of Eastern's liabilities and which executed the agreements providing for the benefits secured by the Coal Act, from any statutory responsibility to meet those obligations.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 551 et seq., and 28 U.S.C. § 2201.

4. Venue of this action lies in the District of Massachusetts pursuant to 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff Eastern is a Massachusetts business trust with a principal place of business in Weston, Massachusetts.

6. Defendant Donna E. Shalala the ("Secretary") is the Secretary of Health and Human Services. She performs her official duties in Washington, D.C. Under Sections 9704 and 9706 of the Coal Act, the Secretary is responsible for assigning retiree beneficiaries to operators who at one time were signatories to a National Bituminous Coal Wage Agreement ("NBCWA") and assessing premiums for retiree health benefits imposed by the Coal Act regardless of whether the retirees ever worked for the operator.

7. Defendants Joseph P. Connors, Sr., Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky and John Doe are the trustees of the United Mine Workers of America Combined Benefit Fund who are responsible under § 9704 and § 9421 of the Coal Act for the collection of premiums from contributors to the Combined Fund. The offices of the Trustees of the Combined Fund are located at 4455 Connecticut Avenue, N.W., Washington, D.C. 20008.

8. Defendant United Mine Workers of America Combined Benefit Fund (the "Combined Fund") is established under § 9702 of the Coal Act as a multiemployer employee welfare benefit plan pursuant to § 302(c)(5) of the Labor Management Relations Act of 1947, and §§ 3(1) and 3(37) of the Employee Income Retirement Security Act of 1974, 29 U.S. C. §§ 1001 et seq. ("ERISA"). The Combined Fund is the result of a February 1, 1993 merger of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan and was established to disburse health and death benefits to its beneficiaries under the Coal Act. The Combined Fund is located at 4455 Connecticut Avenue, N.W., Washington, D.C. 20008. The Combined Fund does business

in the Commonwealth of Massachusetts by sending notices of payments due and by collecting premiums in the Commonwealth.

FACTS

History of the United Mine Workers of America Funds

9. The United Mine Workers of America ("UMWA") is a labor organization that represents certain bituminous coal miners for purposes of collective bargaining.

10. The UMWA and coal mine operators, individually or through various multiemployer bargaining associations, negotiated the 1950 National Bituminous Coal Wage Agreement ("1950 NBCWA"), signed and effective as of March 4, 1950. The 1950 NBCWA created the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). The 1950 W&R Fund was an "irrevocable trust created pursuant to Section 302(c) of the 'Labor-Management Relations Act, 1947.'" 1950 NBCWA.

11. The 1950 W&R Fund was designed to pay "benefits to employees of said operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance . . . [and] benefits on account of sickness, temporary disability, permanent disability, death or retirement." Signatory mine operators were required to contribute thirty cents (30¢) per ton "during the life of this Agreement." The obligation to make such contributions was "several and not joint" among the signatory operators. 1950 NBCWA.

12. Eastern was a signatory to the 1950 NBCWA. Through its former Coal Division, Eastern mined coal in the states of West Virginia, Pennsylvania and Kentucky. Eastern used UMWA-represented employees at its coal mining operations.

13. The 1950 NBCWA was amended, effective January 18, 1951 ("1951 Amendment"), to reflect the creation of the Bituminous Coal Operators' Association ("BCOA") as the collective bargaining representative for certain member operators and as primary negotiator with the UMWA for the 1951 Amendment and subsequent NBCWAs. The 1951 Amendment did not alter the provisions relating to the 1950 W&R Fund. The BCOA was a signatory to the 1951 Amendment, and Eastern, by reason of the operations of its former Coal Division, was a member of the BCOA.

14. The 1950 NBCWA was amended through negotiations between the UMWA and the BCOA, effective October 1, 1952 ("1952 Amendment") to provide for increased contributions to the 1950 W&R Fund from thirty cents (30¢) to forty cents (40¢) per ton. The BCOA was a signatory to the 1952 Amendment, and Eastern, by reason of the operations of its former Coal Division, was a member of the BCOA.

15. The 1950 NBCWA was later amended through negotiations between the UMWA and the BCOA, effective September 1, 1955 ("1955 Amendment"), effective October 1, 1956 ("1956 Amendment") and effective December 1, 1958 ("1958 Amendment"). The 1955 Amendment, 1956 Amendment and 1958 Amendment did not alter the provisions relating to the 1950 W&R Fund. The BCOA was a signatory to the 1955, 1956 and 1958 Amendments, and Eastern, by reason of the operations of its former Coal Division, was a member of the BCOA.

16. The 1950 NBCWA was later amended through negotiations between the UMWA and the BCOA, effective April 2, 1964 ("1964 Amendment"). The 1964 Amendment modified the provisions of the 1950 W&R Fund by adding an obligation to contribute eighty cents (80¢) per ton for purchased or acquired coal. On information and belief, Eastern was a signatory, by reason of the operations of its former Coal

Division, to the 1964 Amendment through its membership in the BCOA.

17. Eastern ceased mining coal prior to 1966 when it transferred its coal mining operations to EACC, a wholly-owned subsidiary. Eastern formed EACC in 1963 as a separate corporation. By January 1, 1966, EACC assumed all present and future liabilities of Eastern arising out of or relating to Eastern's coal mining and marketing operations (with the exception of several leases for which Eastern remained responsible along with EACC). By the end of the 1966 fiscal year, Eastern had made substantial contributions into the 1950 W&R Fund of over $50 million, fully satisfying all of its contractual obligations to the UMWA and to its UMWA-represented employees.

18. As of January 1, 1966, EACC replaced Eastern for all purposes as a signatory to the 1964 and all prior NBCWAs; EACC was a signatory to all subsequent NBCWAs, including the 1974, 1978 and 1988 NBCWAs.

19. From January 1, 1966 on, EACC continued and expanded the operations of Eastern's former Coal Division, initially using the same mines, the same miners, the same equipment and the same management. EACC accurately held itself out to the world as the "successor" to Eastern's former Coal Division.

20. In the usual course of business, EACC accepted and fulfilled all of Eastern's former Coal Division obligations, including making payments to retirees of Eastern's former Coal Division who had never worked for EACC, and assuming responsibility for black lung claims for claimants who had been employed by Eastern, but not by EACC.

21. The 1950 NBCWA was again amended through negotiations between the UMWA and the BCOA, effective April 1, 1966 ("1966 Amendment"). The 1966 Amendment did not alter the provisions relating to contributions to the 1950 W&R Fund.

22. Eastern was not a signatory to the 1966 Amendment or to any later NBCWA agreement or amendment because Eastern had ceased mining operations upon the transfer of all such operations, assets and obligations to EACC, which transfer was completed by January 1, 1966.

23. After 1966, the UMWA and the BCOA negotiated numerous Amendments to the 1950 NBCWA, and a number of new NBCWAs, affecting the 1950 W&R in various ways.

24. The UMWA and the operators that were members of the BCOA negotiated new National Bituminous Coal Wage Agreements in 1968 and 1971 ("1968 and 1971 NBCWAs"). The 1968 and 1971 NBCWAs did not alter the provisions relating to contributions to the 1950 W&R Fund.

25. The UMWA and the operators that were members of the BCOA negotiated a new National Bituminous Coal Wage Agreement in 1974 ("1974 NBCWA"). Partly in response to the enactment of ERISA, the BCOA and the UMWA created a new set of Pension Trusts and Health Benefit Plans. The 1974 NBCWA created the UMWA 1950 Pension Trust ("1950 Pension Trust") and transferred to it the assets of the 1950 W&R Fund. The 1974 NBCWA also created three new plans: the 1974 Pension Trust and two Health Benefit Plans: the UMWA 1950 Benefit Plan and Trust ("1950 Health Benefit Plan") and the UMWA 1974 Benefit Plan and Trust ("1974 Health Benefit Plan"). The Health Benefit Plans provided health and other benefits to retired coal miners (the 1950 Health Benefit Plan for miners who retired before January 1, 1976 and the 1976 Health Benefit Plan for miners who retired after January 1, 1976).

26. The 1974 NBCWA changed the manner in which signatory employers made contributions. All of the assets of the 1950 W&R Fund – including all of the contributions of Eastern – were transferred to the 1950 Pension Fund. The 1974 Pension Fund, and the Health Benefit Plans, were established

without reserves, but were financed with contributions from signatory employers commencing on the effective date of the 1974 NBCWA.

27. The 1974 NBCWA also changed the class of beneficiaries entitled to benefits by greatly expanding it. Prior to the 1974 NBCWA, only "Widows of Men Killed in Mines" were entitled to "[c]ontinuation of hospital and medical coverage." 1971 NBCWA. The 1974 NBCWA provided, by contrast, that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage." 1974 NBCWA.

28. The UMWA and the BCOA negotiated another new NBCWA in 1978 ("1978 NBCWA"). The 1978 NBCWA modified the Health Benefit Plans created in 1974. The Agreement required that health benefits for miners who retired after January 1, 1976 be provided by individual plans of signatory operators (rather than the 1974 Health Benefit Plan), and that the 1974 Health Benefit Plan be used exclusively to provide health benefits to miners who retired after January 1, 1976 and whose operators were "no longer in business." 1978 NBCWA.

29. In negotiations for the 1978 NBCWA, the UMWA and the BCOA agreed to a "guarantee" clause which provided:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.

30. The "guarantee" clause obligated signatory operators, for the first time, to make sufficient contributions to assure payment of health and other benefits provided by the 1950 Health Benefit Plan and the 1974 Health Benefit Plan. Prior to 1978, no signatory coal operator had any obligation to make up

any deficits, and no right to demand any particular benefits for its miners in the benefit programs of the 1950 and 1974 Health Benefit Plans, or their predecessor, the 1950 W&R Fund. Prior to 1978, signatory coal operators agreed to contribute at a set rate based on tons of coal mined, but they did not guarantee that those contributions would be sufficient to assure payment of any particular level or particular kind of health benefits to beneficiaries.

31. As a result of negotiations leading to the 1978 NBCWA, the Plan documents for the 1950 and 1974 Health Benefit Plans, which were incorporated by reference into the 1978 NBCWA, included, for the first time, what is known as the "Evergreen Clause." The "Evergreen Clause" reads:

> Any Employer who employed any Participant eligible for coverage under, or who received or receives benefits under, the 1950 [1974] Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 [1974] Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 [1974] Benefit Trust, as amended from time to time, including, but not limited to, making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.

1950 Health Benefit Plan (February 1988). The "Evergreen Clause" has been interpreted to mean that the signatories to the 1978 NBCWA obligated themselves to continue making contributions to the 1950 and 1978 Health Benefit Plans notwithstanding their subsequent withdrawal from the BCOA or the expiration of other contractual obligations to the UMWA.

32. In negotiations for the 1978 NBCWA, the UMWA and the BCOA also agreed to give the BCOA the unilateral authority to increase contribution rates as necessary to fully fund benefits.

33. Successive NBCWAs were negotiated (in 1981, 1984, and 1988) between the UMWA and those operators that were members of the BCOA, in which contribution rates were increased.

34. In negotiations for the National Bituminous Coal Wage Agreement of 1988 ("1988 NBCWA"), the UMWA and the operators which were members of the BCOA agreed that if any signatory employer's contributions to the 1950 or 1974 Health Benefit Plan ceased for any reason, the signatory would be obligated to pay withdrawal liability.

35. The cumulative effect of the changes negotiated by the UMWA and the BCOA, as described in paragraphs 27 through 36, was to transform the 1950 W&R Fund, to which Eastern had once contributed, from a plan of limited contributor liability, under which the parties agreed that contributors would be obligated to make only such periodic contributions as were fixed by contract and would not be liable for further contributions if benefit costs outstripped accumulated plan funds, to plans which provided for potentially unlimited liability for the future costs of specified benefits. Eastern was never associated with such a plan and never agreed to any such obligation.

36. As a result of the increased levels of benefits promised and paid by the 1950 and 1974 Health Benefit Plans, the change in the funding formula from tonnage-based to hours-based, the decreased revenues caused by increased worker productivity and fewer man hours worked, the expansion of the class of beneficiaries and, most notably, the failure of the BCOA to increase contribution rates for signatory operators, the 1950 Health Benefit Plan experienced its first deficit in 1988, and the 1974 Health Benefit Plan experienced its first deficit in 1990.

The 1992 Coal Act

37. On October 24, 1992, President Bush signed the Coal Act into law as part of the Energy Policy Act of 1992. Eastern avers, upon information and belief, that the Coal Act guarantees

continued lifetime health and death benefits to the approximately 114,000 UMWA retirees, surviving spouses, and dependents who were receiving benefits from the 1950 or 1974 Health Benefit Plans as of July 20, 1992.

38. The Coal Act, in effect, creates three classes of current and former coal mining industry employers:

(i) signatories to the 1988 NBCWA or a "me-too" agreement patterned after the 1988 NBCWA ("1988 Agreement Operators");

(ii) employers that did not sign the 1988 NBCWA, but were signatories to any pre-1988 NBCWA between 1950 and 1978 ("Reachback Companies"); and

(iii) employers that were never signatory to an NBCWA ("Non-signatory Employers").

39. Prior to the enactment of the Coal Act, the 1988 Agreement Operators were contractually required to satisfy the obligations of the 1950 and 1974 Health Benefit Plans including lifetime health benefits for the beneficiaries. The Coal Act for the first time purports to impose that contractual obligation on companies who were not signatories to the 1988 Agreement. Furthermore, the Coal Act purports to impose the same obligation on companies who were not even signatories to the 1974 or the 1978 Agreements. The Coal Act guarantees lifetime health benefits that Operators had contracted to provide between 1974 and 1988, but purports to make all Reachback Companies, including those that signed neither the 1974 nor the 1978 Agreement, responsible for making premium payments to fund those benefits.

40. Over and above the health benefits provided by the Coal Act, the Coal Act purports to make Reachback Companies responsible for making premium payments sufficient to provide death benefits identical to those provided under the 1950 Pension Trust or 1974 Pension Trust as of July 20, 1992.

41. Section 9702 of the Coal Act created the UMWA Combined Benefit Fund ("Combined Fund"). The Coal Act divides beneficiaries of the Combined Fund into two groups: (i) assigned beneficiaries, i.e., those UMWA retirees who once worked for a 1988 Agreement Operator or a Reachback Company, and the spouses or certain dependents of those UMWA retirees; and (ii) unassigned beneficiaries, i.e., those UMWA retirees who worked for a company that no longer exists, but that once signed an NBCWA at any time between 1950 and July 20, 1992, and the spouses or certain dependents of those retirees.

42. The Coal Act purports to require the Secretary to assign to Eastern as a Reachback Company both former employees (and spouses or dependents) and a percentage of unassigned beneficiaries. Consequently, if the assignments made by the Secretary are not withdrawn, Eastern will be liable for annual premiums in excess of $3 million to pay for health and death benefits with respect to former employees, their spouses and dependents and unassigned beneficiaries.

43. The Coal Act makes no provision for the refund of premiums paid to the Combined Fund in the event the Coal Act is found to be unconstitutional as applied to any contributor to the Combined Fund.[1]

44. The Secretary has delegated her authority to assign individuals to operators under the Coal Act to the Social Security Administration (the "SSA").

45. By Notices dated September 28, October 7, October 8, October 15, October 18, October 19, and October 22, 1993 (the "Notices of Assignment"), Eastern was informed by the SSA that it had been assigned liability under the Coal Act for a total of approximately 2284 retired miners, surviving spouses, and dependents. Of the approximately 1180 identified miners, 1177

[1] § 9706(f)(3)(A)(i) of the Coal Act provides a credit system for payments made due to ministerial errors but provides no refund mechanism.

had last worked for Eastern, according to the Notices of Assignment, prior to 1966. (Clearly, at least the three post-1965 miners were assigned to Eastern in error, as Eastern had by that time already transferred its former coal mining operations to EACC.)

46. In the case of approximately 941 miners (and approximately 904 other beneficiaries), the Notices of Assignment sent to Eastern stated that Eastern was the operator found to have employed the miners under a UMWA agreement for the longest period of time before 1978, i.e., as a Reachback Company.

47. In the case of approximately 212 miners (and approximately 194 other beneficiaries), the Notices of Assignment erroneously asserted that Eastern was the last operator to employ the miners under an agreement for at least two years and that Eastern was a signatory to a 1978 or later UMWA agreement. Eastern was not a signatory to a 1978 or later agreement.

48. In the case of approximately 27 miners (and approximately 29 other beneficiaries), the Notices of Assignment erroneously asserted that Eastern was the last operator to employ the miners under an agreement and that Eastern was a signatory to a 1978 or later UMWA agreement. Eastern was not a signatory to a 1978 or later agreement.

49. The Coal Act and the Notices of Assignment sent pursuant thereto purport to demand from Eastern a premium having three components. First, the Coal Act requires the Secretary to assess against Eastern a premium sufficient to cover costs of health benefits for retirees who worked for Eastern decades ago, as well as the surviving spouses and dependents of such retirees. Second, the Coal Act requires a similar premium assessment for unassigned miners and their surviving spouses and dependents. These premiums are based on the 1992 cost of benefits provided by the 1950 and 1974 Health Benefit Plans, plus administrative costs, adjusted thereafter for inflation.

Third, the Coal Act requires the Secretary to assess against Eastern a premium sufficient to cover costs of death benefits for particular beneficiaries. In addition to these three components, the Coal Act purports to assess against Eastern an additional amount in the first year of payments. Because the Coal Act imposes premium liability beginning with February 1993, but does not begin to assess those premiums until October of 1993, the final component of the premium is a partial payment of those past accrued premiums. The aggregate premium is to be contributed to the Combined Fund created under the Coal Act.

50. By Memorandum dated October 22, 1993 from the Trustees of the Combined Fund, Eastern was notified that it would be required to pay a monthly premium to the Combined Fund, beginning with the month of October 1993, of $421,109.18. The deadline for payment of the October premium was deferred until November 8, 1993. Thereafter, beginning November 25, 1993, according to the Memorandum, monthly premiums would be due on the 25th of each month.

51. The Memorandum sent by the Combined Fund states that the premiums payable for the period beginning October 1993 do not include any amount attributable to death benefits or unassigned persons, inasmuch as the costs of such coverage have been satisfied for the moment with funds transferred from the 1950 Pension Trust. Nevertheless, Eastern avers, upon information and belief, that notwithstanding this temporary relief, the Coal Act by its terms would eventually require Eastern to contribute substantial additional premiums for death benefits and benefits for unassigned persons.

52. Pursuant to the Financial Accounting Standards Board Standard No. 106, Eastern was required to immediately reflect on its financial reports the value of contributions that the Coal Act would require it to pay into the Combined Fund over the lifetime of the fund. This adjustment substantially reduced the net worth of Eastern and resulted in a substantial loss for the fiscal year ending December 31, 1993.

53. Eastern is a Reachback Company which no longer operates bituminous coal mines. Upon information and belief, under the Coal Act, Eastern must pay premiums with respect to benefits for former employees to whom it had never promised such benefits and also for an indeterminate number of unassigned individuals with whom Eastern has never had an employment relationship. Because the number of unassigned individuals is a function, in part, of the number of operators or former operators to which individuals may be assigned, excluding operators or former operators that have gone out of business or will go out of business, Eastern estimates that its proportionate share of unassigned individuals, and the absolute number of unassigned individuals for which Eastern will be responsible, will increase.

54. The liability allegedly owed by Eastern under the Coal Act is one that EACC assumed when it took over Eastern's former Coal Division in 1966. The liability relates to Eastern's former coal operations and was, accordingly, transferred to EACC and remained with EACC when it was acquired by Peabody Coal Co.

Eastern's Request for Relief
on Successor Company Grounds

55. Eastern was advised by the SSA, in the various Notices of Assignment, that Eastern had "the right to ask [the SSA] to review the assignment. ... [based upon] evidence that ... shows [the SSA's] assignment was in error. ... If you do not give [the SSA] evidence, [the SSA] will not review the assignment."

56. Other than brief references to the Coal Act, the SSA's Notices of Assignment gave no indication of the criteria under which the SSA made the original assignments or by which the SSA would judge a request for review or its supporting evidence, nor the procedure under which the request for review should be pursued. Rather, the SSA merely stated that an assigned operator may obtain relief upon presentation of "prima facie" evidence that the assignment was in error. As examples of such

evidence, the SSA referred to "legal documents such as incorporation, merger and bankruptcy papers, ... payroll and other employment business records, and information in trade journals and newspapers."

57. On December 21, 1993, Eastern submitted to the SSA a Freedom of Information Act request for information on the SSA's assignment criteria, including information regarding the SSA's approach to assignments to a successor company under the Coal Act.

58. In response to that Freedom of Information Act request, Eastern received, among other material, a copy of Transmittal No. 9 (SSA Pub. No. 68-0101402) (Jan. 1994), which contains instructions regarding the circumstances under which a "successor company" can be responsible for the Coal Act liability of a signatory operator.

59. On April 27, 1994, Eastern submitted a written request to the SSA for guidance on a series of procedural issues, including the process for pursuing relief from the Coal Act under the successor company provisions of Transmittal No. 9.

60. On May 26, 1994, the SSA advised Eastern in writing that Eastern could apply for relief from liability under the Coal Act by submission of "prima facie evidence that its status is such that no assignments should be made to it" because Eastern "transferred the mining operations to another company which ought to be the assignee . . . ." In subsequent oral communications, the SSA again urged Eastern to make its submission for relief from the Coal Act on successor company grounds.

61. On June 17, 1994, Eastern submitted to the SSA its request that all beneficiaries assigned to Eastern be reassigned to its successor, EACC. The request was supported by a memorandum of law and factual materials, including affidavits and relevant documents. This submission demonstrated that EACC is a 1978 signatory which became the successor as of January 1, 1966 to all of Eastern's coal-related liabilities,

including any liabilities that could be assigned to Eastern under the Coal Act.

62. On July 25, 1994, the SSA advised Eastern that, despite the SSA's written and oral invitation to seek "successor company" relief, no action would be taken on Eastern's submission until after Eastern had filed all of its individual beneficiary requests for review. The SSA subsequently confirmed that Eastern would be required to make the individual beneficiary submissions prior to any determination on the successor company issue. On September 10, 1994, Eastern submitted 34 boxes to the SSA containing requests for review of the assignments of 1,079 individual beneficiaries, as well as a request for complete relief from the Coal Act on procedural due process grounds, along with a memorandum of law.

63. On January 18, 1995, the SSA notified Eastern of its denial of Eastern's request that all beneficiaries assigned to Eastern under the Coal Act be reassigned to EACC on successor company grounds. The SSA further advised Eastern that it would be afforded no opportunity to appear and present an argument on the successor company issue to the SSA's staff.

64. The SSA then sent to Eastern a copy of "Coal Act Supplemental Review Instructions #3," dated December, 1994, which instructions set forth for the first time the SSA's new, revised position that when a signatory operator remains in business, no consideration is given to the existence of any successor to that signatory operator in making a determination on assignments.

65. On January 30, 1995, Eastern received the SSA's first official response to a request for review of an assignment of an individual beneficiary to Eastern. The SSA rejected Eastern's request that Samuel E. East and Josephine East (a beneficiary whose assignment to Eastern was based on the employment of her husband, Samuel E. East) be reassigned to EACC, clearly

indicating that the SSA had decided that no beneficiaries would be reassigned to EACC by reason of successorship.

66. In its decision, the SSA stated that "the 1966 reorganization of [Eastern's] mining assets into a subsidiary, Eastern Associated Coal Corporation, did not constitute a transfer of Eastern Enterprises' liability for Coal Act premiums for past periods. The transfer could not establish Eastern Associated Coal Corporation as a 'successor' because Eastern Enterprises remained in business. Nor did the subsequent sale of its subsidiary relieve Eastern Enterprises of liability for assignments. Any sales agreement calling for the buyer to indemnify, reimburse, or assume responsibilities for the seller's past liabilities is a private agreement between the parties and has no effect on the assignment provisions of the Coal Act."

67. This decision was apparently based on the newly-issued Supplemental Coal Act Review Instructions #3, which state, in pertinent part, "If the assignee is the signatory operator that employed the miner 'in the coal industry,' AND it remains 'in business' within the meaning of the Coal Act; Then the assignee is responsible under the Coal Act, regardless of whether or not there is a 'successor' company." Id. at 35.

68. The SSA's decision also stated that "[b]ased on [the SSA's] review, [the SSA had] determined that Eastern Enterprises would remain eligible for assignments under the Coal Act and would be responsible for the health and death premiums of Samuel E. East and his eligible relatives." On information and belief, Samuel E. East is dead.

69. If the Coal Act is enforced against Eastern, Eastern will be irreparably harmed. The Coal Act contains no refund provisions, leaving Eastern no remedy at law to recover any payments made to the Combined Fund. A finding of unconstitutionality by this Court will not trigger a remedy for Eastern if it has already contributed under the Coal Act.

COUNT I

70. Eastern restates and incorporates herein by reference the allegations in paragraphs 1-69 of the Complaint.

71. Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq, the Secretary's decision that EACC's status as Eastern's successor is irrelevant to assignments under the Coal Act is arbitrary, capricious, an abuse of discretion, unreasonable and unconstitutional, and is an impermissible interpretation of the Coal Act.

COUNT II

72. Eastern restates and incorporates herein by reference the allegations in paragraphs 1-69 of the Complaint.

73. Under 28 U.S.C. § 2201(a), there is an actual controversy as to Eastern's rights and obligations under the Coal Act. Under a proper interpretation of the Coal Act, Eastern is entitled to a determination that EACC is Eastern's successor, and that all assignments originally made to Eastern under the Coal Act should be reassigned to EACC.

COUNT III

74. Eastern restates and incorporates herein by reference the allegations in paragraphs 1-69 of the Complaint.

75. The Coal Act, on its face or as applied to Eastern, deprives Eastern of "property . . . without due process of law," in violation of the Fifth Amendment of the United States Constitution.

COUNT IV

76. Eastern restates and incorporates herein by reference the allegations in paragraphs 1-69 of the Complaint.

77. The Coal Act, on its face or as applied to Eastern, takes from Eastern "private property . . . for public use, without just compensation," in violation of the Fifth Amendment of the United State Constitution.

PRAYER FOR RELIEF

WHEREFORE, Eastern requests that this Court:

1. Reverse or set aside the Secretary's decision that EACC's status as Eastern's successor is irrelevant to assignments made by the SSA under the Coal Act as arbitrary, capricious, an abuse of discretion, unreasonable and unconstitutional and as an impermissible reading of the Coal Act, pursuant to the Court's authority under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq;

2. Declare, pursuant to 28 U.S.C. §2201(a), that, under the Coal Act, the SSA must consider the existence of successor companies in its assignment analysis, that EACC is Eastern's successor, and that the Secretary is required to reassign all miners originally assigned to Eastern to EACC as Eastern's successor under the Coal Act;

3. Declare that the Coal Act, on its face or as applied to Eastern, violates the Due Process Clause of the Fifth Amendment of the United States Constitution;

4. Declare that the Coal Act, on its face or as applied to Eastern, violates the Takings Clause of the Fifth Amendment of the United States Constitution;

5. Order the Secretary to rescind the assignments of miners and beneficiaries to Eastern pursuant to the Coal Act;

6. Enjoin the Secretary from taking any action to apply or enforce the Coal Act with respect to Eastern;

7. Enjoin the Trustees of the Combined Fund and the Combined Fund from taking any action to collect premiums from Eastern under the Coal Act; and

8. Provide such further relief as is just and equitable.

Respectfully submitted,

EASTERN ENTERPRISES,
by its attorneys,

/s/ Ellen Solomon-Gonzales
John T. Montgomery, BBO #352220
William S. Elias, BBO #363626
Ellen Solomon-Gonzales, BBO#565041
ROPES & GRAY
One International Place
Boston, Massachusetts 02110-2624
(617) 951-7000

Dated: February 15, 1995

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Caption Omitted)

FEDERAL DEFENDANT'S ANSWER TO
FIRST AMENDED COMPLAINT

Federal Defendant Secretary of Health and Human Services Donna E. Shalala ("Secretary"), by her undersigned counsel, answers the First Amended Complaint in the above-entitled action as follows:

FIRST DEFENSE

Plaintiff Eastern Enterprises fails to state a claim for which relief can be granted.

SECOND DEFENSE

The takings claim asserted in this First Amended Complaint is premature because it nowhere alleges that plaintiff has sought a determination whether compensation is available for any taking by filing an action in the Court of Federal Claims.

THIRD DEFENSE

Plaintiff has failed to join Eastern Associated Coal Corporation and Peabody Holding Company, Inc. as necessary parties to this litigation.

FOURTH DEFENSE

In response to the numbered paragraphs of plaintiff's First Amended Complaint, the Secretary answers as follows:

PRELIMINARY STATEMENT

1. This paragraph contains introductory statements and legal conclusions to which no answer is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this introductory paragraph.

2. This paragraph contains introductory statements and legal conclusions to which no answer is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this introductory paragraph.

JURISDICTION AND VENUE

3. This paragraph sets forth plaintiff's legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph as to Count IV of the First Amended Complaint since plaintiff has failed to seek a determination whether compensation is available for any taking by filing an action in the Court of Federal Claims.

4. This paragraph sets forth plaintiff's legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies that 28 U.S.C. § 1391(e) confers venue over Count IV of plaintiff's First Amended Complaint.

PARTIES

5. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

6. Defendant Secretary admits that she is currently the Secretary of Health and Human Services. The Secretary denies the allegations in the second sentence of this paragraph except to admit that the Secretary performs some of her official duties in Washington, D.C.. The third sentence of this paragraph set forth plaintiff's legal conclusions and characterizations to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that, pursuant to sections 9704 and 9706 of the Coal Act, the Secretary of Health and Human Services is generally responsible for (i) assigning eligible beneficiaries of the United Mine Workers of America Combined Benefit Fund

("Combined Fund") to coal operators (or their related persons) who were signatory to one or more coal wage agreements and for (ii) calculating annual per-beneficiary health benefit premiums.

7. The Secretary denies that Joseph P. Connors, Sr. and John Doe are Trustees of the Combined Fund. The Secretary admits that Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carlton R. Sickles, and Gail R. Wilensky are Trustees of the Combined Fund. The Secretary further admits that the offices of the Trustees of the Combined Fund are located at 4455 Connecticut Avenue, N.W., Washington, D.C. 20008. The remaining allegations in this paragraph set forth plaintiff's legal conclusions and characterizations to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that section 9704 of the Coal Act provides that each assigned operator shall make annual Coal Act premium payments (for each plan year) to the Combined Fund.

8. The Secretary admits the first three sentences of this paragraph. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence of this paragraph.

FACTS

History of the United Mine Workers of America Fund

9. The Secretary admits the allegations in this paragraph.

10. The Secretary admits the allegations in the first sentence of this paragraph. The Secretary admits that the 1950 National Bituminous Wage Agreement ("NBCWA") created the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W&R Fund") and respectfully refers the Court to the 1950 NBCWA for a full and complete statement of its terms. The Secretary admits that the 1950 NBCWA contains the language quoted in the third sentence of this paragraph and

respectfully refers the Court to the 1950 NBCWA for a full and complete statement of its terms.

11. The Secretary admits that the 1950 NBCWA contains the language quoted in the first sentence of this paragraph and respectfully refers the Court to the 1950 NBCWA for a full and complete statement of its terms. The Secretary admits that signatory operators to the 1950 NBCWA were respectively obligated to pay thirty cents per ton of 2,000 pounds of each ton of coal produced for use or for sale. The Secretary admits that the 1950 NBCWA contains the language quoted in the third sentence of this paragraph and respectfully refers the Court to the 1950 NBCWA for a full and complete statement of its terms.

12. The Secretary admits that plaintiff was a signatory to the 1950 NBCWA. The Secretary admits upon information and belief the remaining allegations in this paragraph.

13. The Secretary admits that the 1950 NBCWA was amended in 1951 with an effective date of February 1, 1951 ("1951 Amendments"), to, inter alia, reflect the creation of the Bituminous Coal Operators' Association ("BCOA") as the collective bargaining representative for certain coal operators, companies, and associations in the negotiation of wage agreements with the United Mine Workers of America ("UMWA"). The Secretary denies the allegations in the second sentence of this paragraph. The Secretary admits that the BCOA was a signatory to the 1951 Amendments. The Secretary further admits upon information and belief that plaintiff was a member of the BCOA.

14. The Secretary admits that the 1950 NBCWA was amended in 1952 with an effective date of October 1, 1952 ("1952 Amendments"). The Secretary further admits that the 1952 Amendments obligated signatory coal operators to respectively pay forty cents per ton of 2,000 pounds of each ton of coal produced for use or for sale and respectfully refers the Court to the 1952 Amendments for a full and complete state-

ment of its terms. The Secretary admits that the BCOA was a signatory to the 1952 Amendments. The Secretary further admits upon information and belief that plaintiff was a member of the BCOA.

15. The Secretary admits that the 1950 NBCWA was amended in 1955 with an effective date of September 1, 1955 ("1955 Amendments"), in 1956 with an effective date of October 1, 1956 ("1956 Amendments"), and in 1958 with an effective date of December 1, 1958 ("1958 Amendments"). The Secretary denies the allegations in the second sentence of this paragraph. The Secretary admits that the BCOA was a signatory to the 1952, 1956, and 1958 Amendments. The Secretary further admits upon information and belief that plaintiff was a member of the BCOA.

16. The Secretary admits that the 1950 NBCWA was amended in 1964 with an effective date of April 2, 1964 ("1964 Amendments"). With respect to the second sentence of this paragraph, the Secretary admits that the 1964 Amendments obligated signatory coal operators, or any subsidiary or affiliate of such operator, to pay eighty cents per ton of 2,000 pounds to the 1950 W&R Fund for each ton of bituminous coal procured or acquired by that operator, subsidiary, or affiliate and respectfully refers the Court to the 1964 Amendments to the 1950 NBCWA for a full and complete statement of its terms. The Secretary admits upon information and belief that plaintiff was a signatory to the 1964 Amendments through its membership in the BCOA.

17. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

18. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to admit that EACC was a signatory to several post-1964 NBCWAs, including the 1974, 1978, and 1988 NBCWAs.

19. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

20. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

21. The Secretary admits that the 1950 NBCWA was amended in 1966 with an effective date of April 1, 1966 ("1966 Amendments"). The Secretary denies the allegations in the second sentence of this paragraph.

22. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to deny that plaintiff was not a signatory to the 1966 Amendments or to any later NBCWAs given that plaintiff's wholly-owned subsidiary (EACC) signed several post-1964 NBCWAs, including the 1966 Amendments and the 1968, 1971, 1974, 1978, 1981, 1984 and 1984 NBCWAs.

23. The Secretary admits that, subsequent to 1966, UMWA and the BCOA entered into new NBCWAs in 1968, 1971, 1974, 1978, 1981, 1984, and 1988. The Secretary denies that UMWA and the BCOA entered into any amendments to the 1950 NBCWA subsequent to the 1966 Amendments. The Secretary respectfully refers the Court to the 1966 Amendments and these new NBCWAs for a full and complete statement of their respective terms.

24. The Secretary admits that UMWA and the BCOA entered into new NBCWAs in 1968 and 1971. The Secretary denies the allegations in the second sentence of this paragraph.

25. The Secretary admits that UMWA and the BCOA entered into a new NBCWA in 1974. With respect to the remaining allegations in this paragraph, the Secretary admits that the 1974 NBCWA provided for the separation of the 1950 W&R Fund into four multiemployer plans: (i) the UMWA 1950

Benefit Plan and Trust ("1950 Benefit Fund") (providing health benefits to miners who retired before January 1, 1976 and their dependents); (ii) the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Fund") (providing health benefits to both active miners and retired miners who retired on or after January 1, 1976 and their dependents); (iii) the UMWA 1950 Plan and Pension Trust ("1950 Pension Fund") (providing pension benefits to miners who retired before January 1, 1976); and (iv) the UMWA 1974 Pension Plan and Trust ("1974 Pension Fund") (providing pension benefits to miners who retired after January 1, 1976). The Secretary further admits that the 1950 Pension Fund succeeded to the assets of the 1950 W&R Fund. The Secretary denies the remaining allegations in this paragraph.

26. The first sentence of this paragraph contains plaintiff's legal conclusions and characterizations to which no answer is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of this paragraph.

27. The first sentence of this paragraph contains plaintiff's legal conclusions and characterizations to which no answer is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence. With respect to the second sentence of this paragraph, the Secretary admits that certain NBCWAs or other trust documents prior to 1974 contained the language quoted therein and respectfully refers the Court to these pre-1974 NBCWAs and trust documents for a full and complete statement of their respective terms. With respect to the third sentence of this paragraph, the Secretary admits that the 1974 NBCWA contains the language quoted therein and respectfully refers the Court to the 1950 NBCWA for a full and complete statement of its terms.

28. The Secretary admits that UMWA and the BCOA entered into a new NBCWA in 1978. With respect to the remaining allegations in this paragraph, the Secretary admits

that the 1978 NBCWA modified the then-existing UMWA Benefit Funds' structure and respectfully refers the Court to the 1978 NBCWA for a full and complete statement of its terms.

29. The Secretary admits that the Art. XX(h) of the 1978 NBCWA contains the quoted language and respectfully refers the Court to the 1978 NBCWA for a full and complete statement of its terms.

30. This paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph except to admit that certain federal courts have addressed issues relating to the interpretation of the so-called "Guarantee Clause."

31. The Secretary admits that the 1978 NBCWA incorporated by reference documents containing a so-called "Evergreen Clause" and that such clause had not been incorporated by reference in previous NBCWAs. The Secretary further admits that documents incorporated by reference into the 1978 NBCWA contain the language quoted in the second sentence of this paragraph and respectfully refers the Court to the 1978 NBCWA for a full and complete statement of its terms and incorporated documents. The third sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph except to admit that certain federal courts, including United Mine Workers of Am. 1974 Pension Plan v. Pittston Co., 984 F.2d 469 (D.C. Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 3039 (1993), have addressed issues relating to the interpretation of the "Evergreen Clause" and respectfully refers the Court to such decisions for a full and complete statement of their terms.

32. This paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph.

33. The Secretary admits that UMWA and the BCOA entered into NBCWAs in 1981, 1984, and 1988. The Court respectfully refers the Court to these NBCWAs for a full and complete statement of their respective terms.

34. The Secretary admits that Art. XX(i)-(j) of the 1988 NBCWA contained so-called "withdrawal liability" provisions and respectfully refers the Court to the 1988 NBCWA for a full and complete statement of its terms.

35. This paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph.

36. The Secretary admits that the 1950 and 1974 Benefit Funds experienced their first overall deficits in fiscal years 1988 and 1990 respectively. The Secretary denies the remaining allegations in this paragraph.

The 1992 Coal Act

37. The Secretary admits the first sentence of this paragraph. The second sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that the Coal Act generally provides for the Combined Fund to pay health and death benefits to eligible beneficiaries and respectfully refers the Court to the Coal Act for a full and complete statement of its terms.

38. This paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph.

39. The first sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that the 1988 NBCWA obligated signatory operators to make specified contributions to the 1950 and 1974 Benefit Funds and respectfully refers the Court to the 1988 NBCWA for a full and

complete statement of its terms. The second sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence. The third sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that section 9704 of the Coal Act obligates signatory coal operators (or their related persons), whether signatory to the 1974 NBCWA, 1978 NBCWA, or any other coal wage agreement, to make specified premium payments to the Combined Fund.

40. This paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph except to admit that section 9704(c) of the Coal Act provides a statutorily-enumerated formula for the calculation of each assigned operators' annual death benefit premium obligations, if any, for each plan year. The Secretary further avers that the Combined Fund's October 1993 memorandum to plaintiff assessed no death benefit premiums for the first and second plan years.

41. The Secretary admits that section 9702 of the Coal Act established the Combined Fund. The second sentence of this paragraph sets forth plaintiff's legal conclusions and characterizations of the Coal Act to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that section 9706 of the Coal Act sets forth a statutorily- mandated assignment process and respectfully refers the Court to this section of the Act for a full and complete statement of its terms.

42. The first sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that section 9706 of the Coal Act requires the Secretary to assign eligible Combined

Fund beneficiaries to a signatory coal operator (or related person) which remains in business. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph except to admit that the Combined Fund has assessed plaintiff an annual premium of $1,841,773.32 for the first Combined Fund plan year (commencing February 1, 1993 and ending September 30, 1993) and $3,211,536.90 for the second plan year (commencing October 1, 1993 and ending September 30, 1994). The Secretary denies that Eastern (or any other assigned operator) to date has been assessed any unassigned beneficiary premiums.

43. This paragraph (and accompanying footnote one) set forth plaintiff's legal conclusions and characterizations of the Coal Act to which no response is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this paragraph.

44. The Secretary admits the allegations of this paragraph.

45. The Secretary admits that plaintiff received several assignment notices from the Social Security Administration ("SSA") in September and October 1992 and respectfully refers the Court to such notices for a full and complete statement of the terms and assignments made therein. The Secretary denies the remaining allegations in this paragraph.

46. The Secretary denies the allegations in this paragraph except to admit that some of SSA's assignment notices identified certain Combined Fund beneficiaries as being assigned to plaintiff on the ground that it was the signatory operator employing the retired miner under an NBCWA for the longest period of time prior to 1978; the Secretary respectfully refers the Court to these assignment notices for a full and complete statement of their respective terms.

47. The Secretary admits that certain of SSA's assignment notices to plaintiff bore a legend, inter alia, identifying Eastern as a signatory to a 1978 or later NBCWA. The Secretary denies

that plaintiff was not a signatory to the 1966 Amendments or to any later NBCWAs given that plaintiff's wholly-owned subsidiary (EACC) signed several post-1964 NBCWAS, including the 1966 Amendments and the 1968, 1971, 1974, 1978, 1981, 1984 and 1984 NBCWAs. The Secretary denies the remaining allegations in this paragraph.

48. The Secretary admits that certain of SSA's assignment notices to plaintiff bore a legend, inter alia, identifying Eastern as a signatory to a 1978 or later NBCWA. The Secretary denies that plaintiff was not a signatory to the 1966 Amendments or to any later NBCWAs given that plaintiff's wholly-owned subsidiary (EACC) signed several post-1964 NBCWAs, including the 1966 Amendments and the 1968, 1971, 1974, 1978, 1981, 1984 and 1984 NBCWAs. The Secretary denies the remaining allegations in this paragraph.

49. The Secretary denies the allegations in the first sentence of this paragraph. The remaining sentences in this paragraph contain plaintiff's legal conclusions and characterizations of the Coal Act to which no response is required. Insofar as an answer is deemed to be required, the Secretary denies the allegations in these sentences except to admit that section 9704 of the Coal Act contains the liability provisions of assigned operators to the Combined fund and respectfully refers the Court to this section for a full and complete statement of its terms.

50. The Secretary admits on information and belief that, by memorandum dated October 22, 1993, the Combined Fund notified plaintiff that its monthly premium payments to the Combined Fund for the second plan year would be $421,109.18. The Secretary denies that plaintiff's first monthly premium payment became due in October 1993. The Secretary admits the allegations in the second and third sentences of this paragraph.

51. The Secretary admits on information and belief that the Combined Fund's October 1993 memorandum to plaintiff assessed no unassigned beneficiary or death benefit premiums

and respectfully refers the Court to this memorandum for a full and complete statement of its terms. The Secretary denies the remaining allegations in this paragraph.

52. The first sentence of this paragraph sets forth legal conclusions to which no response is required. Insofar as an answer may be deemed to be required, the Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph.

53. The Secretary lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph. The second sentence of this paragraph contains plaintiff's characterizations of the Coal Act to which no answer is required. Insofar as an answer may be deemed to be required, the Secretary denies the allegations in this sentence except to admit that plaintiff is an "assigned operator" within the meaning of the Coal Act and thus obligated to make annual premium payments to the Combined Fund. The Secretary denies the allegations in the third sentence of this paragraph.

54. The Secretary denies the allegations in this paragraph.

Eastern's Request for Relief
on Successor Company Grounds

55. The Secretary admits that SSA notified plaintiff of its Combined Fund beneficiary assignments pursuant to section 9706(e) of the Coal Act and that such notices contained, in part, the language quoted in this paragraph. The Secretary respectfully refers the Court to these notices for a full and complete statement of their terms.

56. This paragraph sets forth plaintiff's legal conclusions and characterizations to which no response is required. Insofar as an answer may be deemed to be required, the Secretary admits only

that SSA notified plaintiff of its Combined Fund beneficiary assignments pursuant to section 9706(e) of the Coal Act and that such notices contained, in part, the language quoted in this paragraph. The Secretary respectfully refers the Court to these notices for a full and complete statement of their terms. The Secretary denies the remaining allegations in this paragraph.

57. The Secretary admits that counsel for plaintiff submitted a Freedom of Information Act ("FOIA") request dated December 21, 1993 and addressed to Ms. Rosario Cirrincione, Director, Freedom of Information Privacy Acts Division, Office of Public Affairs, Department of Health and Human Services, concerning the Coal Act. The Secretary respectfully refers the Court to this FOIA correspondence for a full and complete statement of its terms.

58. The Secretary admits that, by letter dated February 14, 1994, Mr. Harris Factor, Acting FOIA Officer, SSA, responded to plaintiff's December 1993 FOIA request and enclosed, inter alia, a copy of Transmittal No. 9 (SSA Pub. No. 68-0101402) (Jan. 1994). The Secretary respectfully refers the Court to Transmittal No. 9 for a full and complete statement of its terms.

59. The Secretary admits that counsel for plaintiff, by letter dated April 27, 1994, requested information from Ms. Marilyn O'Connell, Deputy Associate Commissioner for Retirement and Survivors Insurance, SSA, concerning certain so-called "procedural issues" underlying SSA's review of plaintiff's Combined Fund beneficiary assignments pursuant to section 9706(f) of the Coal Act. The Secretary respectfully refers the Court to this correspondence for a full and complete statement of its terms.

60. The Secretary admits that, by letter dated May 26, 1994, Ms. O'Connell responded in writing to plaintiff's April 1994 inquiry. The Secretary further admits that the O'Connell letter contains, in part, the language quoted in the first sentence of this paragraph and respectfully refers the Court to this correspondence for a full and complete statement of its terms. The

Secretary denies the allegations in the second sentence of this paragraph.

61. The Secretary admits that, by letter dated June 17, 1994, plaintiff filed a request for SSA review of all Combined Fund beneficiary assignments to Eastern pursuant to section 9706 of the Coal Act, and for reassignment of these beneficiaries to the alleged "successor company" to Eastern's coal operations, Eastern Associated Coal Corporation ("EACC"). With respect to the second sentence of this paragraph, the Secretary admits that plaintiff's request for review also enclosed a supporting memorandum and other documentary materials. The Secretary denies the allegations in the third sentence of this paragraph except to admit that EACC was a signatory to the 1978 NBCWA.

62. The Secretary denies the allegations in the first and second sentences of this paragraph. With respect to the third sentence of this paragraph, the Secretary admits that plaintiff, by letter dated September 9, 1994, submitted additional documentary materials in support of its request for review and respectfully refers the Court to these additional materials for a full and complete statement of their terms.

63. The Secretary denies the allegations in the first sentence of this paragraph except to admit that, by letter dated January 18, 1995, Ms. O'Connell responded to several inquiries posed by counsel for plaintiff regarding the administrative review process for Combined Fund beneficiary assignments pursuant to section 9706 of the Coal Act. The Secretary denies the allegations in the second sentence of this paragraph.

64. The Secretary admits that, accompanying Ms. O'Connell's correspondence of January 18, was a copy of "Coal Act Supplemental Review Instructions #3," (December 1994) ("Supplemental Instructions") The remaining allegations in this paragraph contain plaintiff's characterizations of these Supplemental Instructions to which no answer is required. To the extent an answer is deemed to be required, the Secretary denies

the remaining allegations in this paragraph except to admit that the Supplemental Instructions provides, in pertinent part, that

> [i]f the assignee is the signatory operator that employed the miner 'in the coal industry' AND it remains 'in business' within the meaning of the Coal Act; [¶] Then the assignee is responsible under the Coal Act, regardless of whether or not there is a 'successor' company.

Id. at 35.

65. The Secretary admits that, by letter dated January 30, 1995, SSA's Western Service Center notified plaintiff that, after reviewing the assignment of Samuel E. East and Josephine East, it had affirmed the original assignment decision assigning these Combined Fund beneficiaries to plaintiff pursuant to the Coal Act [hereinafter "East decision letter"]. The remaining allegations in this paragraph contain plaintiff's characterizations of this East decision letter to which no answer is required. To the extent an answer is deemed to be required, the Secretary denies the remaining allegations in this paragraph and respectfully refers the Court to this decision letter for a full and complete statement of its terms.

66. The Secretary admits that the East decision letter contains the language quoted in this paragraph and respectfully refers the Court to this decision letter for a full and complete statement of its terms.

67. The Secretary denies the allegations in this paragraph except to admit that the Supplemental Instructions contains the language quoted and respectfully refers the Court to this document for a full and complete statement of its terms.

68. The Secretary admits that the East decision letter contains the language quoted in the first sentence of this paragraph and respectfully refers the Court to this decision letter for a full and complete statement of its terms. The Secretary admits the allegations in the second sentence of this

paragraph. The Secretary further avers on information and belief that the Combined Fund has to date assessed plaintiff no health or death benefit premiums with respect to Mr. East.

69. The Secretary denies the allegations in this paragraph.

COUNT I

70. The Secretary herein incorporates by reference her responses to paragraphs 1-69 of this Answer.

71. The Secretary denies the allegations in this paragraph.

COUNT II

72. The Secretary herein incorporates by reference her responses to paragraphs 1-69 of this Answer.

73. The Secretary denies the allegations in this paragraph.

COUNT III

74. The Secretary herein incorporates by reference her responses to paragraphs 1-69 of this Answer.

75. The Secretary denies the allegations in this paragraph.

COUNT IV

76. The Secretary herein incorporates by reference her responses to paragraphs 1-69 of this Answer.

77. The Secretary denies the allegations in this paragraph.

PRAYER FOR RELIEF

The Secretary denies that plaintiff is entitled to the relief prayed for in this action, or to any relief whatsoever.

WHEREFORE, having fully answered, the Secretary prays this action be dismissed with prejudice, and for such other and further relief as the Court deems just and reasonable under the circumstances.

DATED: March 2, 1995

Respectfully submitted,

Frank W. Hunger
Assistant Attorney General

Donald K. Stern
United States Attorney

Suzzane Durell
Assistant U. S. Attorney

/s/ Brian G. Kennedy

/s/ Gretchen E. Jacobs
Trial Attorney

Department of Justice
Federal Programs Branch
Civil Division
Department of Justice
Room 922
901 E. Street, N.W.
Washington, D.C. 20530
(202) 514-3489
Fax: (202) 616-8202

Attorneys for Defendant
Shalala

OF COUNSEL:
John M. Sacchetti
Mark Ledford
Retirement, Survivors
and Supplemental Assistance Branch

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Caption Omitted)

ANSWER OF DEFENDANTS THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND AND ITS TRUSTEES TO FIRST AMENDED COMPLAINT

Defendants United Mine Workers of America Combined Benefit Fund (the "Combined Fund") and its Trustees (collectively, "Defendants"), answer the First Amended Complaint ("Complaint") as follows:

INTRODUCTION

The statute at issue in this case is the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 (the "Coal Act"). The Coal Act was enacted by Congress as part of the Energy Policy Act of 1992, and was signed into law by President Bush on October 24, 1992.

The Coal Act adds a new Subtitle J to the Internal Revenue Code of 1986. 106 Stat. 3037-56. The new Internal Revenue Code sections included within Subtitle J are numbered from 9701 through 9722. 26 U.S.C. §§ 9701-9722.

PRELIMINARY STATEMENT

1. The allegations in paragraph 1 of the Complaint are Plaintiff's characterization of this action and Plaintiff's description of the relief it seeks, neither of which require an answer. Defendants expressly state, however, that the Coal Act comports fully with the Due Process Clause and the Takings Clause of the Fifth Amendment and that Plaintiff is not entitled to any of the relief it seeks.

2. Defendants deny that the Coal Act transfers any contractual obligations. Defendants further deny that Eastern

Associated Coal Corp. ("EACC") has been relieved of any of its obligations under the Coal Act. Defendants otherwise lack sufficient knowledge or information to admit or deny the allegations in paragraph 2 of the Complaint.

JURISDICTION AND VENUE

3. The allegations in paragraph 3 of the Complaint are conclusions of law, which need not be admitted or denied.

4. The allegations in paragraph 4 of the Complaint are conclusions of law, which need not be admitted or denied.

PARTIES

5. Upon information and belief, Defendants admit the allegations in paragraph 5 of the Complaint.

6. Defendants admit that Donna E. Shalala is the Secretary of Health and Human Services ("the Secretary") and that she maintains an office in Washington, D.C. Defendants lack sufficient knowledge or information to form a belief as to where Ms. Shalala performs her official duties. The remaining allegations in paragraph 6 of the Complaint are conclusions of law, which need not be admitted or denied.

7. Defendants deny that Joseph P. Connors, Sr., and John Doe are Trustees of the Combined Fund (the "Combined Fund"). Defendants admit that Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carlton R. Sickles, and Gail R. Wilensky are Trustees of the Combined Fund. (Mr. Segal's name is misspelled in the Complaint.) Defendants state that Michael H. Holland and William P. Hobgood are Trustees of the Combined Fund. Defendants further admit that the offices of the Trustees of the Combined Fund are located at 4455 Connecticut Avenue, N.W., Washington, D.C. 20008. The remaining allegations in paragraph 7 of the Complaint are conclusions of law, which need not be admitted or denied.

8. Defendants admit that the Combined Fund was established under the Coal Act as a multiemployer employee

welfare benefit plan under the Labor Management Relations Act of 1947, and the Employee Retirement Income Security Act of 1974 ("ERISA"). Defendants further admit that, in accordance with 26 U.S.C. § 9702(a)(2), the 1950 UMWA Benefit Plan and Trust and the 1974 UMWA Benefit Plan and Trust were merged into the Combined Fund as of February 1, 1993. Defendants further admit that the Combined Fund is located at 4455 Connecticut Avenue, N.W., Washington, D.C. 20008. Defendants further admit that, under the Coal Act, the Combined Fund sends to Assigned Operators notices of payments due. Assigned Operators in the Commonwealth of Massachusetts are included in the group to which such notices are sent. Defendants deny that the Combined Fund collects premiums or does business in the Commonwealth of Massachusetts. With respect to the purpose of the Combined Fund, Defendants rely upon the Coal Act to speak for itself. To the extent any other allegations in paragraph 8 of the Complaint are not expressly addressed in the foregoing, they are denied.

HISTORY OF THE UNITED MINE WORKERS OF AMERICA FUNDS

9. Upon information and belief, Defendants admit the allegations in paragraph 9 of the Complaint.

10. Upon information and belief, Defendants admit that the UMWA and certain coal mine operators negotiated the 1950 National Bituminous Coal Wage Agreement ("1950 NBCWA"). Defendants deny that the effective date of the 1950 NBCWA was March 4, 1950. Defendants admit, however, that the effective date of the 1950 NBCWA was March 5, 1950. Defendants admit the allegations in the second sentence of paragraph 10 of the Complaint. Defendants admit that the language quoted in the third sentence of paragraph 10 of the Complaint appears in the 1950 National Bituminous Coal Wage Agreement ("NBCWA"). Defendants rely upon the language of the 1950 NBCWA to speak for itself. To the extent any other allegations are not expressly addressed in the foregoing, they are denied.

11. Defendants admit that the language quoted in paragraph 11 of the Complaint appears in the 1950 NBCWA. Defendants rely upon the language of the 1950 NBCWA to speak for itself, and need not admit or deny Plaintiff's characterizations of that agreement.

12. Defendants admit that Plaintiff was a signatory to the 1950 NBCWA. Upon information and belief, Defendants admit the remaining allegations in paragraph 12 of the Complaint.

13. Defendants admit that the 1950 NBCWA was amended January 18, 1951 ("1951 Amendment"), effective February 1, 1951, and reflected the creation of the Bituminous Coal Operators' Association ("BCOA") as the collective bargaining representative of certain member operators and as primary negotiator with the UMWA for the 1951 Amendment and subsequent NBCWAs. Defendants otherwise rely upon the language of the 1951 Amendment to speak for itself, and need not admit or deny Plaintiff's characterizations of the 1951 Amendment. Defendants admit that BCOA was a signatory to the 1951 Amendment. Upon information and belief, Defendants admit that Plaintiff was a member of BCOA. To the extent any other allegations in paragraph 13 of the Complaint are not expressly addressed in the foregoing, they are denied.

14. Defendants admit that the 1950 NBCWA was amended through negotiations between the UMWA and BCOA, effective October 1, 1952 ("1952 Amendment"). Defendants rely upon the language of the 1952 Amendment to speak for itself, and need not admit or deny Plaintiff's characterizations of the 1952 Amendment. Defendants admit, however, that the 1952 Amendment provided for increased contributions to the 1950 W&R Fund from thirty cents ($0.30) to forty cents ($0.40) per ton. Defendants admit that BCOA was a signatory to the 1952 Amendment. Upon information and belief, Defendants admit that Plaintiff was a member of BCOA. To the extent any other

allegations in paragraph 14 of the Complaint are not expressly addressed in the foregoing, they are denied.

15. Defendants admit that the 1950 NBCWA was later amended on several occasions through negotiations between the UMWA and BCOA, and that some of those amendments were effective September 1, 1955 ("1955 Amendment"), October 1, 1956 ("1956 Amendment"), and December 1, 1958 ("1958 Amendment"). Defendants rely upon the language of the 1955 Amendment, the 1956 Amendment, and the 1958 Amendment to speak for itself, and need not admit or deny Plaintiff's characterization of those Amendments. Defendants admit that BCOA was a signatory to the 1955 Amendment, the 1956 Amendment, and the 1958 Amendment. Upon information and belief, Defendants admit that Plaintiff was a member of BCOA. To the extent any other allegations in paragraph 15 of the Complaint are not expressly addressed in the foregoing, they are denied.

16. Defendants admit that the 1950 NBCWA was later amended through negotiations between the UMWA and BCOA, effective April 2, 1964 ("1964 Amendment"). Defendants rely upon the language of the 1964 Amendment to speak for itself, and need not admit or deny Plaintiff's characterizations of the 1964 Amendment. Defendants admit, however, that the 1964 Amendment modified the provisions of the 1950 W&R Fund by adding an obligation to contribute eighty cents ($0.80) per ton for purchased or acquired coal. Upon information and belief, Defendants admit that Plaintiff was a signatory to the 1964 Amendment through its membership in BCOA. To the extent any other allegations in paragraph 16 of the Compliant are not expressly addressed in the foregoing, they are denied.

17. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 17 of the Complaint.

18. Upon information and belief, Defendants admit that EACC was a signatory to all NBCWAs after 1966, including the

1974, 1978, and 1988 NBCWAs. Defendants otherwise lack sufficient knowledge or information to admit or deny the allegations in paragraph 18 of the Complaint.

19. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 19 of the Complaint.

20. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 20 of the Complaint.

21. Defendants admit that the 1950 NBCWA was again amended through negotiations between the UMWA and BCOA, effective April 1, 1966 ("1966 Amendment"). The remaining allegations in paragraph 21 of the Complaint are conclusions of law, which need not be admitted or denied. Defendants rely upon the language of the 1966 Amendment to speak for itself.

22. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 22 of the Complaint.

23. Defendants admit that after 1966 the UMWA and BCOA negotiated new Amendments to the 1950 NBCWA, and negotiated new NBCWAs. The remaining allegations in paragraph 23 of the Complaint are conclusions of law, which need not be admitted or denied. Defendants rely upon the language of the NBCWAs to speak for itself.

24. Defendants admit that the UMWA and BCOA negotiated new NBCWAs in 1968 and 1971 ("1968 and 1971 NBCWAs"). Defendants rely upon the language of the 1968 and 1971 NBCWAs to speak for itself, and need not admit or deny Plaintiff's characterization of those agreements. The remaining allegations in paragraph 24 of the Complaint are conclusions of law, which need not be admitted or denied.

25. Defendants admit that the UMWA and BCOA negotiated a new NBCWA in 1974 ("1974 NBCWA"). Defendants further admit that, partly in response to the enactment of ERISA, the 1974 NBCWA replaced the 1950 W&R Fund with four new entities: the UMWA 1950 Pension

Plan and Trust ("1950 Pension Trust"), the UMWA 1974 Pension Plan and Trust ("1974 Pension Trust"), the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Trust"), and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust"). Defendants further admit that the 1950 Benefit Trust provided health and other benefits to coal miners who retired before January 1, 1976, and that the 1974 Benefit Trust provided health and other benefits to coal miners who retired on or after January 1, 1976. Defendants otherwise rely upon the language of the 1974 NBCWA to speak for itself, and need not admit or deny Plaintiff's characterization of that agreement.

26. Defendants deny Plaintiff's characterization of the 1974 NBCWA as set forth in paragraph 26 of the Complaint, and rely upon the language of the 1974 NBCWA to speak for itself.

27. Defendants deny Plaintiff's characterizations of the 1971 and 1974 NBCWAs as set forth in paragraph 27 of the Complaint, and rely upon the language of those agreements to speak for itself. Defendants admit, however, that the language quoted in the second sentence of paragraph 27 of the Complaint appears in the 1971 NBCWA, and the language quoted in the third sentence of paragraph 27 of the Complaint appears in the 1974 NBCWA. The remaining allegations in paragraph 27 of the Complaint are conclusions of law, which need not be admitted or denied.

28. Defendants admit that the UMWA and BCOA negotiated a new NBCWA in 1978 ("1978 NBCWA"). Defendants further admit that the 1978 NBCWA generally required that health benefits for miners who retired on or after January 1, 1976, be provided by individual employer plans maintained by signatory operators (rather than by the 1974 Benefit Trust), and that the 1974 Benefit Trust be retained exclusively as an "orphan" plan, to provide benefits to miners who retired on or after January 1, 1976, whose former employers were "no longer in business." Defendants otherwise rely upon the language of the 1978 NBCWA to speak for itself,

and need not admit or deny Plaintiff's characterization of that agreement.

29. Defendants admit that the quoted language in paragraph 29 of the Complaint appears in the 1978 NBCWA and has sometimes been referred to as the "guarantee" clause. Defendants otherwise rely upon the language of the 1978 NBCWA to speak for itself.

30. The allegations in paragraph 30 of the Complaint are conclusions of law, which need not be admitted or denied. By way of further answer, Defendants deny Plaintiff's characterizations of the NBCWAs and trust documents, and rely upon the language of those agreements and documents to speak for itself.

31. Defendants admit that the language quoted in paragraph 31 of the Complaint appears in the trust documents prepared for the 1950 and 1974 Benefit Trusts in 1978, that this language sometimes has been referred to as the "evergreen" clause, that the evergreen clause was negotiated during the negotiations leading to the 1978 NBCWA, and that the trust documents for the 1950 and 1974 Benefit Trusts were incorporated by reference into the 1978 NBCWA. Defendants further admit that the evergreen clause has been interpreted to require signatory employers to continue contributing to the 1950 and 1974 Benefit Trusts in accordance with the 1978 NBCWA and any successor NBCWAs for as long as such agreements require contributions to the Trusts. Defendants otherwise deny Plaintiff's characterizations of the trust documents, and rely upon the language of those documents to speak for itself. To the extent any other allegations in paragraph 31 of the Complaint are not expressly addressed in the foregoing, they are denied.

32. Defendants rely upon the language of the 1978 NBCWA to speak for itself, and need not admit or deny Plaintiff's characterization of that agreement in paragraph 32 of the Complaint.

33. Defendants admit that successive NBCWAs were negotiated in 1981, 1984, and 1988 between the UMWA and BCOA. Defendants deny Plaintiff's characterizations of those NBCWAs, and rely upon the language of those agreements to speak for itself. Defendants admit, however, that contribution rates for the UMWA Pension and Benefit Trusts were changed from time to time under those NBCWAs, and that some of those changes were increases.

34. Defendants rely upon the language of the 1988 NBCWA to speak for itself, and need not admit or deny Plaintiff's characterization of that agreement. Defendants admit, however, that the 1988 NBCWA provides for withdrawal liability in several circumstances specified in the agreement, including (but not limited to) situations in which a signatory employer ceases, for whatever reason, to have an obligation to contribute to the 1950 or 1974 Benefit Trusts.

35. The allegations in the first sentence of paragraph 35 of the Complaint are conclusions of law, which need not be admitted or denied. To the extent the first sentence of paragraph 35 incorporates the allegations in paragraphs 27-36 of the Complaint (or paragraphs 25-34, which appear to be the paragraphs to which Plaintiff intended to refer), Defendants incorporate here by reference their responses in paragraphs 27-36 (or paragraphs 25-34) of this Answer. Defendants deny the remaining allegations in paragraph 35 of the Complaint.

36. Defendants deny the allegations in paragraph 36 of the Complaint.

THE 1992 COAL ACT

37. Defendants admit that on October 24, 1992, President Bush signed the Coal Act into law as part of the Energy Policy Act of 1992. The remaining allegations in paragraph 37 of the Complaint are conclusions of law, which need not be admitted or denied. Defendants rely upon the Coal Act to speak for itself.

38. The allegations in paragraph 38 of the Complaint are conclusions of law, which need not be admitted or denied. Defendants deny Plaintiff's characterization of the Coal Act, and rely upon the language of the Coal Act to speak for itself.

39. Defendants deny the allegations in paragraph 39 of the Complaint.

40. Defendants deny Plaintiff's characterization of the Coal Act in paragraph 40 of the Complaint, and rely upon the language of the Coal Act to speak for itself.

41. Defendants admit that the Combined Fund was created in accordance with Section 9702 of the Coal Act, 26 U.S.C. § 9702. Defendants otherwise deny Plaintiff's characterization of the Coal Act in paragraph 41 of the Complaint, and rely upon the language of the Coal Act to speak for itself.

42. Defendants deny Plaintiff's characterization of the Coal Act in paragraph 42 of the Complaint, and rely upon the language of the Coal Act to speak for itself. Defendants state, however, that, based on the Secretary's assignment of beneficiaries, the Combined Fund has assessed Plaintiff an annual premium of $1,841,773.32 for the first plan year, which is an eight-month "year" beginning February 1, 1993, and ending September 30, 1993, and $3,211,536.90 for the second plan year, beginning October 1, 1993, and ending September 30, 1994. Defendants further state that these premiums for the Combined Fund's first two plan years were to be paid in twelve equal installments, the first of which was due on November 8, 1993, and the remainder of which were due on the 25th of each month from November 1993 through September 1994. Defendants further state that no portion of these premiums is attributable to unassigned beneficiaries.

43. The allegations in paragraph 43 of the Complaint, including footnote 1, are conclusions of law, which need not be admitted or denied. Defendants deny Plaintiff's characterization

of the Coal Act, and rely upon the language of the Coal Act to speak for itself.

44. Upon information and belief, Defendants admit the allegations in paragraph 44 of the Complaint.

45. Defendants admit that Plaintiff has been assigned liability under the Coal Act for certain retired miners, surviving spouses, and dependents. Defendants further admit that the Combined Fund has sent Plaintiff a memorandum, dated October 22, 1993, assessing premiums for 1,494 beneficiaries assigned to Plaintiff for the Combined Fund's first plan year and 1,430 beneficiaries assigned to Plaintiff for the Combined Fund's second plan year. Upon information and belief, Defendants further admit that many (if not all) of the identified miners were identified as having last worked for Plaintiff prior to 1966. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 45 of the Complaint.

46. Upon information and belief, Defendants admit that in the case of some miners (and other beneficiaries related to miners), Plaintiff was notified that it was the operator that employed the miner under a UMWA agreement for the longest period of time before 1978. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 46 of the Complaint.

47. The allegations in the first sentence of paragraph 47 of the Complaint contain conclusions of law, which need not be admitted or denied. Upon information and belief, Defendants admit that in the case of some miners (and other beneficiaries related to miners), Plaintiff was notified that it was the last operator to employ the miner under a UMWA agreement for at least two years, and that it was a signatory to a 1978 or later agreement with the UMWA. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 47 of the Complaint.

48. The allegations in the first sentence of paragraph 48 of the Complaint contain conclusions of law, which need not be admitted or denied. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations of paragraph 48 of the Complaint.

49. Defendants deny Plaintiff's characterization of the Coal Act and Notices of Assignment in paragraph 49 of the Complaint, and rely upon the language of the Coal Act and the Notices to speak for itself.

50. Defendants deny that Plaintiff was notified that it would be required to make a premium payment in the month of October 1993. Defendants further deny that the October 22, 1993 memorandum referred to in paragraph 50 of the Complaint was from the Trustees of the Combined Fund. Defendants state that the memorandum was from Donald E. Pierce, Jr., who was, at the time of the memorandum, Executive Director, UMWA Health & Retirement Funds. Defendants admit that the memorandum notified Plaintiff of its obligation to make twelve monthly premium payments, in the amount of $421,109.18 each, beginning on November 8, 1993 and continuing thereafter on the 25th of each month from November 1993 through September 1994. Defendants state that these twelve monthly payments comprised Eastern's premium obligations for the Combined Fund's first two plan years, as set forth in paragraph 42 of this Answer. To the extent any remaining allegations in paragraph 50 of the Complaint are not addressed by the foregoing, they are denied.

51. Defendants admit that the October 22, 1993 memorandum from Mr. Pierce did not assess any premium for death benefits or for unassigned beneficiaries' health benefits. Defendants further admit that Congress provided in the Coal Act for certain transfers of funds from other sources to the Combined Fund, that these transfers are to occur during the years from February 1, 1993 through September 30, 2004, and that the first two such transfers – of $70,000,000 each from the 1950 Pension Trust – occurred on February 1, 1993, and

October 1, 1993. Defendants further admit that these transfers were sufficient to eliminate any need for any death benefit premium or unassigned beneficiaries' premium during the Combined Fund's first two plan years. To the extent any other allegations in the first sentence of paragraph 51 of the Complaint are not expressly addressed in the foregoing, they are denied. The allegations in the second sentence of paragraph 51 of the Complaint consist of speculation or predictions about future events, which Defendants need not admit or deny. To the extent that any answer is required, Defendants, upon information and belief, deny the allegations in the second sentence of paragraph 51 of the Complaint.

52. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 52 of the Complaint.

53. Defendants lack sufficient knowledge or information to admit or deny the allegations in the first and last sentences of paragraph 53 of the Complaint. Defendants deny Plaintiff's characterization of the Coal Act in the second sentence of paragraph 53 of the Complaint, and rely upon the language of the Coal Act to speak for itself. Defendants state, however, that Plaintiff is an assigned operator as that term is defined in the Coal Act and is responsible for payment of annual premiums to the Combined Fund.

54. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 54 of the Complaint.

55. Defendants admit that the quoted language in paragraph 55 of the Complaint appears in Notices of Assignment issued by SSA to Plaintiff. Defendants otherwise do not admit or deny Plaintiff's characterization of the Notices, but rely on the language of the Notices to speak for itself.

56. Defendants admit that the quoted language in paragraph 56 of the Complaint appears in Notices of Assignment issued by SSA to Plaintiff. Defendants otherwise do not admit or deny Plaintiff's characterization of the Notices, but rely on the language of the Notices to speak for itself.

57. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 57 of the Complaint.

58. Defendants admit that Transmittal No. 9 (SSA Pub. No. 68-0101402) (January 1994) is an SSA document that concerns SSA's review of assignment decisions under the Coal Act. Defendants do not admit or deny Plaintiff's characterization of Transmittal No. 9, but rely on the language of the document to speak for itself. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 58 of the Complaint.

59. Defendants admit that on April 27, 1994, Plaintiff, through its counsel, submitted a letter to SSA. Defendants do not admit or deny Plaintiff's characterization of the letter, but rely on the language of the letter to speak for itself.

60. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 60 of the Complaint.

61. Defendants admit that on June 17, 1994, Eastern, through its counsel, submitted a letter and memorandum to SSA. Defendants do not admit or deny Plaintiff's characterization of the letter and memorandum, but rely on the language of the documents to speak for itself. The allegations in the third sentence in paragraph 61 of the Complaint are conclusions of law which need not be admitted or denied. To the extent that an answer is required, Defendants lack sufficient knowledge or information to admit or deny the allegations in the third sentence of paragraph 61.

62. Defendants lack sufficient knowledge or information to admit or deny the allegations in paragraph 62 of the Complaint.

63. Defendants admit that on January 18, 1995 SSA sent a letter to Eastern's counsel responding to various letters previously sent by Eastern's counsel to SSA. Defendants do not admit or deny Plaintiff's characterization of SSA's letter, but rely on the language of the letter to speak for itself.

64. Defendants admit that SSA has issued a document entitled "Supplemental Coal Act Review Instructions #3," dated December 1994. Defendants do not admit or deny Plaintiff's characterization of that document, but rely on the language of the document to speak for itself. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 64 of the Complaint.

65. Defendants admit that on January 30, 1995, SSA sent a letter to Eastern, in care of its counsel, denying Eastern's request that two Combined Fund beneficiaries, Samuel E. East and Josephine East, be reassigned to EACC. Defendants otherwise do not admit or deny Plaintiff's characterization of SSA's letter, but rely on the language of the letter to speak for itself. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 65 of the Complaint.

66. Defendants admit that, apart from minor typographical errors, the language quoted in paragraph 66 of the Complaint appears in the January 30, 1995 letter from SSA to Eastern. Defendants do not admit or deny Plaintiff's characterization of the letter, but rely on the language of the letter to speak for itself.

67. Defendants admit that the language quoted in paragraph 67 of the Complaint appears on page 35 of SSA's Supplemental Coal Act Review Instructions #3 (December 1994). Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in paragraph 67 of the Complaint.

68. Defendants admit that, apart from minor typographical errors, the language quoted in paragraph 68 of the Complaint appears in SSA's letter of January 30, 1995. Defendants do not admit or deny Plaintiff's characterization of SSA's letter, but rely on the language of the letter to speak for itself. Upon information and belief, Defendants admit the allegations in the second sentence of paragraph 68 of the Complaint.

69. The allegations in paragraph 69 of the Complaint are conclusions of law, which need not be admitted or denied. By way of further answer, Defendants deny Plaintiff's characterizations of the Coal Act, and rely upon the language of the Coal Act to speak for itself.

COUNT I

70. Defendants restate and incorporate by reference their responses to the allegations in paragraphs 1-69 of the Complaint.

71. The allegations in paragraph 71 of the Complaint are conclusions of law, which need not be admitted or denied, and which in any event are not addressed to Defendants.

COUNT II

72. Defendants restate and incorporate by reference their responses to the allegations in paragraphs 1-69 of the Complaint.

73. The allegations in paragraph 73 of the Complaint are conclusions of law, which need not be admitted or denied, and which in any event are not addressed to Defendants.

COUNT III

74. Defendants restate and incorporate by reference their responses to the allegations in paragraphs 1-69 of the Complaint.

75. The allegations in paragraph 75 of the Compliant are conclusions of law, which need not be admitted or denied. Defendants deny, however, that the Coal Act violates the Due Process Clause of the Fifth Amendment, and state that the Coal Act comports fully with the Constitution of the United States.

COUNT IV

76. Defendants restate and incorporate by reference their responses to the allegations in paragraphs 1-69 of the Complaint.

77. The allegations in paragraph 77 of the Complaint are conclusions of law, which need not be admitted or denied. Defendants deny, however, that the Coal Act violates the

Takings Clause of the Fifth Amendment, and state that the Coal Act comports fully with the Constitution of the United States.

PRAYER FOR RELIEF

78. Defendants deny that Plaintiff is entitled to any relief based on Counts III and IV of the Complaint. Defendants further deny that Plaintiff is entitled to any relief whatever against Defendants.

79. Defendants deny any allegations of the Complaint that are not admitted or expressly addressed above.

AFFIRMATIVE DEFENSES

The Complaint, to the extent it seeks relief against Defendants, fails to state a claim upon which relief can be granted.

WHEREFORE, Defendants request that Plaintiff's claims against Defendants be dismissed with prejudice, and that Defendants be awarded their fees and costs, including reasonable attorneys' fees, together with such further relief as the Court may determine is proper and just.

COUNTERCLAIM

The United Mine Workers of America Combined Benefit Fund ("Combined Fund") and its Trustees allege their counterclaim against Plaintiff Eastern Enterprises as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment that the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701 et seq. which was signed into law by President Bush on October 24, 1992, does not violate the Due Process or Takings Clauses of the Fifth Amendment by requiring companies that signed one or more previous National Bituminous Coal Wage Agreements ("NBCWAs") but did not sign the 1988 NBCWA to pay Annual Premiums to the United

Mine Workers of America Combined Benefit Fund (the "Combined Fund").

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 28 U.S.C. § 2201.

3. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391(b) and (c).

PARTIES

4. Counterclaim Plaintiffs are the Combined Fund and its seven Trustees.

5. Counterclaim Defendant is Eastern Enterprises ("Eastern").

FACTS

The Financial Crisis That Threatened The Collectively-Bargained Trust Funds Providing Health Benefits To Retired Miners

6. For more than 40 years, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA") have negotiated and signed a series of collective bargaining agreements known as NBCWAs. Each NBCWA to date has contained provisions requiring signatory coal operators to provide health benefits to retired miners and their dependents. These benefits were provided through trust funds financed by employers signing the NBCWAs or so-called "me too" agreements. Eastern signed the 1950 NBCWA and several amendments thereto.

7. From 1950 to 1974 the benefits mandated by the NBCWAs were provided through a multiemployer welfare plan known as the United Mine Workers of America Welfare and Retirement Fund. Subsequently, from 1974 to 1993, the NBCWA-mandated retiree health benefits were provided through the UMWA 1950 Benefit Plan and Trust ("1950 Benefit

Fund") and the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Fund"). The 1950 Benefit Fund generally provided health benefits to eligible UMWA miners who retired before 1976, and the 1974 Benefit Fund generally provided health benefits to eligible post-1975 UMWA retirees whose last employer had gone out of business.

8. Eastern's retirees received health benefits from the UMWA Welfare and Retirement Fund until 1974 and thereafter, until February 1, 1993, from the 1950 Benefit Fund or the 1974 Benefit Fund. From February 1, 1993 forward, Eastern's retirees that previously received benefits from the 1950 Benefit Fund or the 1974 Benefit Fund have been receiving and will continue to receive health benefits from the Combined Fund.

9. Upon information and belief, Eastern ceased contributing to the UMWA Welfare and Retirement Fund in or around 1966, and Eastern never contributed to the 1950 Benefit Fund or the 1974 Benefit Fund. Yet for many years, from in or around 1966 to 1993, Eastern's retirees received benefits from the UMWA Welfare and Retirement Fund and from the 1950 Benefit Fund or the 1974 Benefit Fund. These benefits were paid for by other employers.

10. During the last decade, the financial stability of the 1950 and 1974 Benefit Funds was cast in serious doubt. The problems became particularly acute during the five-year term of the 1988 NBCWA. The crisis was attributable to several factors. One of the most important was that numerous coal companies that had signed the 1978 NBCWA (and, frequently, subsequent NBCWAs as well) attempted in the 1980s to avoid responsibility for contributing to the costs of health coverage for UMWA retirees and their dependents. These companies terminated their participation in the 1950 and 1974 Benefit Funds and "dumped" the retirees that they were then covering through individual employer plans into the 1974 Benefit Fund.

The Coal Act - Congress' Response To The Financial Crisis

11. In response to the financial difficulties that threatened the 1950 and 1974 Benefit Funds, Congress enacted the Coal Act as part of the Energy Policy Act of 1992, and President Bush signed the Coal Act into law on October 24, 1992.

12. In enacting the Coal Act, Congress found that:

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Section 19142(a), 106 Stat. 3037.

13. Among other things, the Coal Act seeks to ensure the continuation of health benefits to tens of thousands of retired coal miners and their dependents by spreading the cost of such health benefits broadly among all employers that voluntarily participated in the UMWA Welfare and Retirement Fund or the 1950 and 1974 Benefit Funds, the collectively-bargained multiemployer arrangements for the provision of health care to UMWA retirees in the coal industry. The Coal Act achieves its objective by requiring that "those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992). Additionally, the Coal Act obligates employers who participated in the UMWA Welfare and Retirement Fund or the 1950 and 1974 Benefit Funds to shoulder a proportionate share of providing health coverage to "orphan retirees" – i.e., those

retirees whose former employers are no longer in business. 26 U.S.C. § 9704(d).

14. The Coal Act provides for the establishment of the Combined Fund as a new private entity. 26 U.S.C. § 9702. The 1950 and 1974 Benefit Funds were both merged into the Combined Fund effective February 1, 1993. 26 U.S.C. § 9702(a)(2). By statute, the Combined Fund provides health benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the 1950 and 1974 Benefit Funds. 26 U.S.C. § 9703(a), (b)(1), (e), and (f).

15. Consistent with Congress' express intent that responsibility for financing the cost of providing health benefits to eligible retirees should be placed on "those companies which employed [the retirees] and thereby benefitted from their service," 138 Cong. Rec. at S17603, the Coal Act requires each "Assigned Operator" to make payments to the Combined Fund. An "Assigned Operator" is an employer that is or was signatory to an NBCWA and to which the Secretary of Health and Human Services assigns retirees covered by the Combined Fund under 26 U.S.C. § 9706.

16. Each Assigned Operator is obligated by the Coal Act to pay an "Annual Premium" to the Combined Fund. The Annual Premium consists of three parts: 1) a health premium for the Assigned Operator's "assigned beneficiaries;" 2) an actuarially-determined death benefit premium; and 3) an "unassigned beneficiaries premium." 26 U.S.C. § 9704(a).

17. The unassigned beneficiaries premium is designed to cover each Assigned Operator's pro rata share of health benefits allocable to retirees who cannot be assigned to an Assigned Operator. Congress required the payment of an unassigned beneficiaries premium because:

> [a]s a practical matter, not all beneficiaries can be assigned to a specific last signatory operator . . . . This is because in some instances, none of those persons remain in business, even as defined to include non-mining related businesses. Thus, provisions are made for unassigned beneficiary premiums. In each plan year each assigned operator will pay a premium earmarked to cover the health costs of these unassigned beneficiaries.

138 Cong. Rec. S17605 (daily ed. Oct. 8, 1992). The Coal Act provides detailed rules for assigning beneficiaries in order to keep to an "absolute minimum" the number of unassigned beneficiaries. Id. In addition, Congress provided subsidies in the Coal Act to offset the unassigned beneficiaries premium. 26 U.S.C. § 9705(a) (authorizing three annual transfers of $70 million from the UMWA 1950 Pension Plan to the Combined Fund); 26 U.S.C. § 9705(b) (authorizing annual transfers of up to $70 million (or more) from the Abandoned Mine Reclamation Fund to the Combined Fund starting October 1, 1995, and continuing through the plan year ending September 30, 2004).

CAUSE OF ACTION

18. Counterclaim Plaintiffs reallege the allegations contained in Paragraphs 1 through 17 of this Complaint as if fully set forth herein.

19. There exists an actual controversy between the Counterclaim Plaintiffs and the Counterclaim Defendant regarding the constitutionality of the Coal Act, in which Congress mandates that Counterclaim Defendant pay Annual Premiums to the Combined Fund. In essence, Counterclaim Defendant claims that the Coal Act is unconstitutional and that it is not bound to make any Annual Premium payments to the Combined Fund. If Counterclaim Defendant's position were accepted, Congress would be effectively precluded from legislating to protect the national interest. Counterclaim Plaintiffs believe, and their position has been adopted in Barrick Gold Exploration, Inc. v. Hudson, 1995 U.S. App. LEXIS 3621 (6th Cir., February 24, 1995), aff'g 823 F. Supp. 1395 (S.D. Ohio 1993); LTV Steel Corp., Inc. v. Shalala, 163 B.R. 955 (S.D.N.Y. 1993), appeal pending, No. 94-6024 (2d Cir. argued December 1,

1994); and Blue Diamond Coal Company v. Shalala, 1994 U.S. Dist. LEXIS 16374 (E.D. Tenn. Nov. 11, 1994), appeal pending, No. 94-6539 (6th Cir.), that the Coal Act fully comports with the requirements of the Due Process and Takings Clauses of the Fifth Amendment and does not effect a "taking" of private property within the meaning of the Fifth Amendment.

20. There exists a need for a prompt declaratory judgment concerning the constitutionality of the Coal Act's provisions governing Assigned Operators like Eastern. Unless challenges to the constitutionality of the Coal Act are expeditiously addressed through declaratory judgment actions, Counterclaim Plaintiffs' ability to meet the Combined Fund beneficiaries' legitimate health care needs may be adversely affected, its collection of Annual Premiums may be impeded, and projected litigation expenses will likely increase, consuming money otherwise available to pay for retiree health care costs.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim Plaintiffs request that this Court enter a judgment: (a) declaring that the Coal Act as applied to Counterclaim Defendant does not effect a "taking" of private property and does not violate the Due Process or Takings Clauses of the Fifth Amendment; and (b) granting Counterclaim Plaintiffs such other and further relief as the Court may deem just and proper, including an award of attorneys' fees and costs.

Respectfully Submitted,

/s/ John R. Mooney
BEINS, AXELROD, OSBORNE, MOONEY & GREEN, P.C.
The Colorado Building
1341 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 783-0010

/s/ Peter Buscemi
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

Robert A. Murphy, BBO #363700 CASNER, EDWARDS & ROSEMAN
1 Federal Street
Boston, MA 02110
(617) 426-0135

Attorneys for Defendant Trustees and the Combined Benefit Fund

March 2, 1995

(Certificate of Service Omitted)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

CORRECTED STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the District of Massachusetts, Eastern Enterprises ("Eastern") submits this Statement of Material Facts as to Which There is No Genuine Issue in conjunction with its Motion for Summary Judgment and Memorandum in support thereof.

Eastern Associated Coal Corp. Acquired Eastern's Coal Operations

1. Eastern Gas and Fuel Associates (known today as Eastern Enterprises) was organized in 1929 as a so-called Massachusetts business trust. For many years, Eastern owned Boston Gas Company (a retail gas company), among other companies, and maintained coal operations – primarily in West Virginia and Pennsylvania – through its Coal Division. Tab 4, Subtab 1 (Philips Aff.), ¶ 4 [RA 201]. [1]

2. In 1963, Eastern created a wholly-owned subsidiary, Eastern Associated Coal Corp. ("EACC"), to take over the operations of its Coal Division. The creation of EACC was consistent with Eastern's view that each operation in a diversified entity such as Eastern should be an independent

[1] Reference to the supporting materials appended to this Statement of Facts appear herein as "Tab _"; references to documents within Tab 4 appear herein as "Tab 4, Subtab _ (Document name)," where "Subtab" refers to the small tab that is part of the document behind Tab 4. [**Petitioner's Note**: supplementary citations have been added to this Statement of Facts to allow the Court to cross-reference the materials to the Record Appendix prepared for the First Circuit. Such citations appear as "[RA _]".]]

corporation, responsible for its own profits, for obtaining its own financing, and for handling its own liabilities, and should hold itself out to the world as a separate operation. Id. at ¶ 5 [RA 201-02].

3. Although EACC was incorporated in 1963, the process of transferring all of Eastern's coal operations to EACC required several years to complete. Id. at ¶ 8 [RA 203]. In particular, it took time to complete the transfer of Eastern's various leases (including obtaining lessor approvals of the transfers), retirement funds and the other aspects of the coal operation. Recognizing that EACC would gradually acquire the Coal Division's operations, Eastern caused EACC to enter into a contract on July 18, 1963 defining the relationship between EACC and the Coal Division during the interim period. The contract provided, among other things, that the sales organization and sales agreements of the Coal Division would be transferred to EACC upon EACC's assumption of the obligations and liabilities of the sales organization, and that mining operations would eventually be transferred to EACC upon the assumption of liabilities and obligations relating to such mining operations. Id. at ¶ 19 [RA 206]; Tab 4, Subtab 5 (Romeo Aff.)., Ex C [RA 259]. In the aftermath of this agreement, Eastern dissolved the Coal Committee that it had utilized for many years to oversee the management of the Coal Division. Tab 4, Subtab 1 (Philips Aff.), ¶ 7 [202-03].

4. As EACC's 1967 Annual Report on Form 10-K described the process, "[s]tarting in 1963, transfers were made to EACC of the coal properties and mining activities of the Coal Division of Eastern in exchange for EACC's common stock and as a contribution to capital... " 1967 Annual Report of Eastern Associated Coal Corp. ("EACC 10-K") Tab 4, Subtab 5 (Romeo Aff.), Ex. G) at p. F-7(1) [RA 306].

5. By January 1, 1966, all assets of Eastern's Coal Division had been transferred to EACC – with the exception of a few leases on which the lessor would not agree to an assignment – and the Coal Division ceased to exist. All coal-related liabilities,

known or unknown, likewise were the responsibility of EACC. As Eastern's 1966 tax return explained:

> During 1966 Eastern Gas and Fuel Associates transferred to Eastern Associated Coal Corp. ... all of its coal properties and related assets ... In addition, Eastern Associated Coal Corp. assumed all the liabilities of Eastern Gas and Fuel Associates arising out of the coal mining and coal marketing operations of Eastern Gas and Fuel Associates.

Tab 4, Subtab 5 (Romeo Aff.), Ex. E [RA 263].

6. Following the transfer of assets and liabilities, EACC repeatedly represented that it was the "successor" to the Eastern Coal Division. In 1967, for example, EACC filed a prospectus with the Securities and Exchange Commission ("SEC") in connection with a public offering of debentures emphasizing that "Eastern Associated Coal Corp. is a wholly-owned subsidiary of Eastern Gas and Fuel Associates ("Eastern") of Boston, Massachusetts, and was incorporated on March 27, 1963 under the laws of West Virginia to be the successor to the Coal Division of Eastern." Prospectus at 2 (Tab 4, Subtab 5 (Romeo Aff.), Ex. F) [RA 265]. The prospectus also stated, at page 14, "[i]n March of 1963, Eastern organized [EACC] as a wholly-owned subsidiary under the laws of the State of West Virginia to be the successor to Eastern's Coal Division. On ... January 1, 1966, Eastern transferred all of its remaining coal properties to [EACC] in exchange for common stock of [EACC]." Id. at 14 [RA 277].

7. EACC made the same point in its Form 10-Ks filed each year with the SEC. Its 1970, 1971, 1972, 1977 and 1978 10-Ks noted that EACC was incorporated "to be the successor to the Coal Division of its parent Eastern Gas and Fuel Associates." 1970 EACC 10-K at 1; 1971 EACC 10-K at 1; 1972 EACC 10-K at 1; 1977 EACC 10-K at 1; and 1978 EACC 10-K at 1. (Tab 4, Subtab 5 (Romeo Aff.), Exs. I-M) [RA 339, 375, 415, 464, 518].

8. Moreover, EACC emphasized in its Form 10-Ks that EACC's operations were one and the same as the operations of Eastern's former Coal Division. In both 1967 and 1968, EACC's annual reports emphasized that "[t]he results of operations of EACC for the year 1967 include all coal operations and mining activities previously conducted by the Coal Division of Eastern." 1967 EACC 10-K at F-7 (Tab 4, Subtab 5 (Romeo Aff.), Ex. G) [RA 306]. See also 1968 EACC 10-K at F-6 (same language) (Tab 4, Subtab 5 (Romeo Aff.), Ex. H) [RA 329]. Similarly, in a marketing brochure published by EACC shortly after its creation, EACC identified itself as "[f]ormerly [the] Coal Division of Eastern Gas and Fuel Associates" and emphasized that it was "a new company ... formed to continue the extensive operations of the Coal Division." Tab 4, Subtab 5 (Romeo Aff.), Ex. N [RA 573, 574].

EACC Continued The Operations Of Eastern's Coal Division

9. EACC continued virtually every aspect of the operations of the former Coal Division. Thus, utilizing the same management as the Coal Division, EACC continued – without a suspension in operations – to operate the same mines and to employ the same miners as Eastern's Coal Division. In the process, EACC operated the same machinery; maintained the same company housing and company stores; operated the same summer camp for the children and grandchildren of miners and retirees, Camp Lightfoot, that had been operated by Eastern's Coal Division, and assumed the banking relationships of the former Coal Division. Tab 4, Subtab 1 (Philips Aff.), ¶¶ 9, 10-11 [RA 203-04]; Tab 4, Subtab 3 (Weinig Aff.), ¶¶ 5-8 [RA 214-16]; Tab 4, Subtab 2 (Freeman Aff.), ¶¶ 3-4 [RA 209].

10. Documents produced by EACC to Eastern regarding the beneficiaries assigned to Eastern under the Coal Act vividly illustrate EACC's successorship status. At least 23 of the miners who have themselves been assigned to Eastern (or whose dependents or widows have been assigned to Eastern) received

letters of reference from EACC attesting to the fact that the miners worked for "this company" (i.e., EACC) during years prior to 1963 (the year EACC was incorporated). Tab 4, Subtab 4 (McVey Aff.), ¶¶ 17-18, Exs. C, D [RA 223-24, 236-37].

11. Similarly, EACC tendered "Field Separation Notices" to at least 105 miners which acknowledged their length of continuing service to the company, including years prior to the creation of EACC. Tab 4, Subtab 4 (McVey Aff.), ¶¶ 13-16, Exs. A, B [RA 222-23, 227-35]. (emphasis added). Finally, in connection with employment applications, five other miners stated that EACC had been a previous employer during periods several years before EACC's creation, thus illustrating the miners' understanding that EACC effectively had become the Coal Division. Tab 4, Subtab 4 (McVey Aff.), ¶ 19 [RA 224].

EACC Assumed Eastern's Coal-Related Liabilities

12. EACC fulfilled all obligations of the former Coal Division as they arose in the years after 1966. Tab 4, Subtab 2 (Freeman Aff.), ¶¶ 4-9 [RA 209-12]; Tab 4, Subtab 4 (McVey Aff.), ¶¶ 4-5 [RA 219]; Tab 4, Subtab 1 (Philips Aff.), ¶¶ 9-19 [RA 203-06]; Tab 4, Subtab 3 (Weinig Aff.), ¶¶ 5-8 [RA 214-16]. For example, federal and state Black Lung legislation permitted a miner to file a claim against his last employer, who (if the claim was valid) was obligated to pay for a portion of his benefits. Tab 4, Subtab 4 (McVey Aff.), ¶ 5 [RA 219]. EACC processed and (when appropriate) paid the Black Lung claims of all the miners who had retired under Eastern's Coal Division. Tab 4, Subtab 2 (Freeman Aff.), ¶ 7 [RA 210-11]; Tab 4, Subtab 4 (McVey Aff.), ¶¶ 5-8 [RA 219-20]. In fact, Jimmy D. McVey, EACC's Manager of Compensation and Benefits from 1974-87, had an internal accounting system that allocated the Black Lung claims to the appropriate mining facility regardless whether the facility was operated currently by EACC or had been closed by Eastern prior to the transfer to EACC. Id. at ¶ 7 [RA 220]. Eastern's federal Black Lung liability was unknown in 1963-66, when the transfers were made to EACC, but EACC paid for

that liability because it had taken on all of Eastern's known and unknown coal-related liabilities. Tab 4, Subtab 2 (Freeman Aff.), ¶ 7 [RA 210-11]; Tab 4, Subtab 3 (Weinig Aff.), ¶ 7 [RA 215].

13. Similarly, EACC took on Eastern's obligations to retirees from the Coal Division. For the Coal Division personnel who retired before the creation of Eastern's pension plan, EACC's Board continued Eastern's practice of voting monthly allowances to those persons, and EACC paid them. Tab 4, Subtab 1 (Philips Aff.), ¶ 13 [RA 205]; Tab 4, Subtab 2 (Freeman Aff.), ¶ 5 [RA 210].

14. In addition, the Retired Employees' Benefit Fund for the Coal Division (and its obligations) were transferred to EACC, and thereafter the Fund paid the health benefits for retirees. Tab 4, Subtab 1 (Philips Aff.), ¶ 14 [RA 205]. Finally, for those Coal Division retirees covered by Eastern's pension plan, EACC annually paid an amount into Eastern's plan sufficient to cover payments to those retirees. Id. at ¶ 15. EACC even continued to recognize that the children and grandchildren of retirees from Eastern's Coal Division were eligible to attend Camp Lightfoot. Tab 4, Subtab 2 (Freeman Aff.), ¶ 6 [RA 210].

15. EACC also assumed all contractual commitments between Eastern and various third parties. In connection with general contract matters, Eastern advised all vendors on December 31, 1965 that:

> All commitments on the part of Eastern Gas and Fuel Associates made prior to January 1, 1966, including contracts, agreements, leases and purchases for delivery or completion after January 1, 1966, will be assumed by Eastern Associated Coal Corp., until the same should be terminated.

Tab 4, Subtab 5 (Romeo Aff.), Ex. D [RA 262]. See also Tab 4, Subtab 1 (Philips Aff.), ¶ 12 [RA 204].

16. More importantly, EACC accepted and performed Eastern's contracts with the United Mine Workers of America ("UMWA"). Thus, EACC replaced Eastern as the member company in the Bituminous Coal Operators Association ("BCOA"), the organization of coal operators that negotiated with the UMWA. Tab 4, Subtab 2 (Freeman Aff.), ¶ 9 [RA 211-12]. EACC likewise replaced Eastern as the signatory to the National Bituminous Coal Wage Agreements ("NBCWA"), including accepting Eastern's obligation to contribute a certain amount per ton of coal mined to the UMWA 1950 Welfare and Retirement Fund (described more fully below), and Eastern's obligation to give priority to union miners who had been laid off at one Eastern mine when rehiring at another Eastern (now EACC) mine. Tab 4, Subtab 2 (Freeman Aff.), ¶¶ 8-9 [RA 211-12]; Tab 4, Subtab 4 (McVey Aff.), ¶ 20 [RA 224].

17. The records of the UMWA Retirement and Benefits Fund recognize that EACC was the successor to Eastern's coal-related liabilities. The Fund records of the dates on which particular companies signed coal wage agreements identify EACC as a signatory for the formerly Eastern mines from January 1, 1966 forward. The January 1, 1966 date, however, does not correlate with the date of a new NBCWA – meaning that EACC could only have been recognized as a NBCWA signatory, and an employer of UMWA member employees, if (as was the fact) it succeeded to Eastern's status as a signatory. These documents were also Exhibits 4 and 5 to the deposition of Marilyn O'Connell and were identified by her as the documents used by the Social Security Administration ("SSA") to determine operators' signatory status. Tab 4, Subtab 6 (Elias Aff.), Ex. B [RA 580-86] (relevant excerpts of Fund's computerized records of signatory dates).

18. The fact that EACC was responsible for all of Eastern's coal-related liabilities was of great practical importance to Eastern. Tab 4, Subtab 3 (Weinig Aff.), ¶¶ 5-6 [RA 214-15]. Because Eastern was a Massachusetts business trust, and not a corporation, the risk existed that a creditor might argue that the

shareholders of the trust were responsible for any unsatisfied debts of Eastern. Id. It was, therefore, very important to both Eastern and its shareholders that actual and potential liabilities be identified and that responsibility for them be limited to the appropriate subsidiary. Id. Eastern's ability to raise capital from institutional investors and in bond offerings was greatly facilitated by the fact that EACC was responsible for all known and unknown coal-related liabilities. Id.

19. Eastern currently owns three subsidiaries: Boston Gas, New England's largest distributor of natural gas, providing service to over 2 million customers in the Commonwealth; Midland Enterprises Inc., a leading barge operator on the nation's inland waterways; and WaterPro Supplies Corporation, a wholesale distributor of components for municipal water and wastewater systems. Eastern is currently in the process of selling WaterPro, and has been forced to indemnify WaterPro against any liabilities for premiums due from Eastern to the Combined Fund asserted against WaterPro as a "related person" under the Coal Act. Tab 45, Supplemental Affidavit of James J. Harper, ¶¶ 2,4 [RA 1568, 1569].

The Sale of EACC to Peabody

20. In 1987, Eastern sold EACC to Peabody Holding Company, Inc., in a stock transaction in which Peabody acquired all of the stock of Coal Properties Corp. which, in turn, held all of the stock of EACC. Tab 4, Subtab 3 (Weinig Aff.), ¶ 9 [RA 216-17]. As a result, all of EACC's liabilities (including the liabilities assumed from Eastern in 1966) remained with EACC.

21. Since the transaction involved only a transfer of the EACC stock, Peabody explained to the UMWA that EACC maintained its corporate identity, and that the acquisition had no effect on EACC's obligations under the NBCWAs. Tab 4, Subtab 6 (Elias Aff.), Ex. A [RA 579].

22. Because EACC, not Eastern, was responsible for the retirees from Eastern's Coal Division (including the miners

assigned to Eastern under the Act), all the records pertaining to those retirees (including workers compensation, Black Lung and other employment records) remained in EACC's possession, and EACC retained them when it was sold to Peabody. Tab 4, Subtab 4 (McVey Aff.), ¶ 9 [RA 220-21].

23. It appears that Peabody, at some point in the Coal Act assignment process, agreed to accept Coal Act responsibility for Eastern's former employees. In OCRO Technical Instruction Bulletin – Number 1, issued in September 1993, SSA stated "[C]orrespondence from Peabody says that they accept responsibility for Eastern Gas and Fuel Association. Eastern Gas and Fuel was formerly the name of Eastern Enterprises." Tab 50, OCRO Technical Instruction Bulletin – Number 1 [RA 1770].

The History of the 1950 W&R Fund While Eastern Mined Coal

24. Prior to the 1940s, UMWA collective bargaining agreements contained no provisions concerning pension or medical benefits. In the 1940s, during collective bargaining negotiations between the UMWA and bituminous coal mining companies, the UMWA demanded the creation of a health and welfare fund for its member miners. The coal companies rejected the UMWA's demand; as a result, the UMWA initiated a strike. Subsequently, President Truman issued an executive order on May 21, 1946 directing the Secretary of the Interior, Julius Krug, to seize the mines. The order also authorized the Secretary to negotiate with the UMWA regarding employment terms and conditions. Tab 42, Staff of House Comm. on Ways and Means, 103d Cong., lst Sess., Financing UMWA Coal Miner "Orphan Retiree" Health Benefits 100-101 (Comm. Print 1993) [RA 1427] [hereinafter "Ways and Means Report"]; Tab 41, Coal Commission Report: A Report to the Secretary of Labor and the American People (Nov. 1990) at 18-19 [RA 1349-50] [hereinafter "Coal Commission Report"].

25. On May 29, 1946, the federal government and the UMWA executed the 1946 National Bituminous Coal Wage Agreement (the "1946 NBCWA"), also known as the Krug-Lewis Agreement, bringing an end to the coal strike. The Krug-Lewis Agreement was effective only during the period of government operation of the mines from May 1946 to June 1947, and contained several provisions providing the "broad outlines" for an employer-sponsored health and welfare program. Tab 42, Ways and Means Report at 101 [RA 1532]; Tab 9, 1946 NBCWA at 132-134 [RA 612-13]. The "health and welfare program" outlined by the Krug-Lewis Agreement comprised two funds: A "Welfare and Retirement Fund," and a "Medical and Hospital Fund." Tab 9, 1946 NBCWA at 132 [RA 612-13].

26. The Welfare and Retirement Fund was financed by a tonnage royalty on bituminous coal production, and was to make payments to miners, and their dependents and survivors, for, inter alia, (i) wage loss due to sickness, disability or retirement, and (ii) and "other related welfare purposes." The Welfare and Retirement Fund was to be managed by three trustees, one appointed by the federal government, one by the UMWA, and the third chosen by the other two. Tab 41, Coal Commission Report at 18-19 [RA 1349-50]. The Welfare and Retirement Fund did not provide medical care benefits. Tab 9, 1946 NBCWA at 132 [RA 612].

27. The separate Medical and Hospital Fund was to be financed by wage deductions rather than by employer contributions; as well, the Medical and Hospital Fund was to be administered entirely by UMWA-appointed trustees, and was to provide medical, hospital and related services to active miners and their dependents. Tab 9, 1946 NBCWA at 132-134 [RA 612-13]; see also Tab 42, Ways and Means Report at 101-02 [RA 1532-33]; Tab 41, Coal Commission Report at 18-19 [RA 1349-50].

28. On July 7, 1947, after control of the mines had been returned to the mine owners, the UMWA entered into a new

collective bargaining agreement, the 1947 National Bituminous Coal Wage Agreement ("1947 NBCWA"), this time with numerous coal operators, including Eastern through its Coal Division. Tab 10, 1947 NBCWA [RA 615].

29. The 1947 NBCWA created a single union welfare trust permitted by Section 302(b) of the Labor Management Relations Act, 29 U.S.C. § 186. The trust was named the UMWA Welfare and Retirement Fund. ("1947 W&R Fund"). Under the express terms of the 1947 NBCWA, the 1947 W&R Fund acquired only the assets of the two Krug-Lewis funds. Tab 10, 1947 NBCWA at 149-150 [RA 620-21]. The 1947 NBCWA required signatory employers to pay the 1947 W&R Fund a royalty of 10¢ a ton for the coal they produced or sold for the duration of the 1947 NBCWA. Id. at 149 [RA 620].

30. The 1947 NBCWA did not mandate any specific benefit be paid from the 1947 W&R Fund, but authorized the 1947 W&R Fund trustees to determine what benefits to provide. The 1947 NBCWA gave the trustees "full authority" to determine benefit eligibility, benefit amounts, the priority among different kinds of benefits, and the manner of providing benefits. The trustees were required to make their benefit determinations by written resolution. Tab 10, 1947 NBCWA at 144-47 [RA 618-19].

31. The 1947 W&R Fund was financed by tonnage royalty payments, and not by employee wage deductions. In contrast, the Medical and Hospital Fund created by the Krug-Lewis Agreement had been financed by "the wage deductions presently being made and such as may hereafter be authorized by the Union and its members for medical, hospital and related purposes." Tab 9, 1946 NBCWA at 133 [RA 612]; Tab 10, 1947 NBCWA at 144 [RA 618].

32. The 1947 W&R Fund was governed by three trustees, one of whom was appointed by the UMWA and one of whom was appointed by mine operators signatory to the 1947 NBCWA. Tab 10, 1947 NBCWA at 144-45 [RA 618]. The

Union representative, by the terms of the 1947 and subsequent NBCWAs, was named Chairman of the trustees of the Fund. Tab 10, 1947 NBCWA at 147 [RA 619]. For many years, and at least between 1947 and the early 1970s, the UMWA trustee dominated the Fund's affairs. Blankenship v. Boyle, 329 F. Supp. 1089, 1095 (1971), affirmed 511 F.2d 447 (1975).

33. The 1947 W&R Fund trustees, over the opposition of the employer-appointed trustee, voted to fund pension benefits directly from the tonnage royalty revenues received from NBCWA operators, rather than investing those receipts in income-producing assets and using investment income to pay pension benefits. This method of benefit financing was called "pay-as-you-go." Tab 42, Ways & Means Report at 104 n. 12 [RA 1535]. The employer-appointed trustee initiated litigation to restrain the majority trustees from using a "pay-as-you-go" financing method, id., but his suit was rejected by the District Court for the District of Columbia, see Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948) and the pay-as-you-go method was initiated for all benefits. Id. For decades thereafter the employer-appointed trustee was effectively excluded from the decision-making process concerning management of the Fund. Blankenship v. Boyle, 329 F. Supp. 1089 (1971), affirmed 511 F.2d 447 (1975).

34. On July 1, 1948, the UMWA and certain coal operators, including Eastern through its Coal Division, entered into a new NBCWA ("1948 NBCWA"). The only substantive change this agreement made to the 1947 W&R Fund was to increase the operator tonnage royalty payments to 20¢ a ton. Tab 11, 1948 NBCWA at 166 [RA 630].

35. On March 5, 1950, the UMWA and certain coal operators, including Eastern through its Coal Division, entered into a new NBCWA ("1950 NBCWA"). The only substantive changes this agreement made to the 1947 W&R Fund were to rename it as the "UMWA Welfare and Retirement Fund of 1950" ("1950 W&R Fund") and to increase operator tonnage

royalty payments to 30¢ a ton. Tab 12, 1950 NBCWA at 59-65 [RA 638-41].

36. The 1950 NBCWA was amended, effective January 18, 1951 ("1951 NBCWA"), to reflect the creation of the Bituminous Coal Operators' Association (BCOA), a multi-employer bargaining association, as the collective bargaining representative of certain member operators and the primary negotiator with the UMWA for subsequent agreements. Eastern was a member of the BCOA through 1965. The 1951 NBCWA did not change the terms controlling the 1950 W&R Fund. Tab 13, 1951 NBCWA [RA 647-48].

37. The 1950 NBCWA was again amended in 1952, 1955, 1956, 1958, and 1964. Tabs 14-18 [RA 649-85]. None of these NBCWAs changed the terms controlling provision of health benefits to UMWA retirees; the operators' tonnage royalty payment increased to 40¢ per ton of mined coal in 1952, see Tab 14, 1952 NBCWA at 41 [RA 650], and a contribution obligation of 80¢ per ton of coal purchased from non-UMWA operators during participation in an NBCWA was established in 1964. Tab 18, 1964 NBCWA at 5 [RA 669]. Eastern, through its Coal Division, was a signatory only through the 1964 Amendment, by virtue of its membership in the BCOA.

38. The UMWA and the BCOA again amended the 1950 NBCWA in 1966, 1968 and 1971, after EACC had succeeded to all Eastern's coal operations and obligations; none of these Amendments significantly changed the terms controlling provision of health benefits to UMWA retirees. EACC was a signatory to the 1966, 1968 and 1971 NBCWAs; Eastern was not. Tab 19, 1966 NBCWA [RA 686-701]; Tab 20, 1968 NBCWA [RA 702-24]; Tab 21, 1971 NBCWA [RA 725-36].

The 1950 W&R Fund Trustees Retained Discretion to Terminate, Suspend or Modify Benefits Unilaterally

39. Signatory operators to the 1950 NBCWA made no commitment to miners concerning the scope or duration of

benefits they would receive. Rather, the trustees of the 1950 W&R Fund were given:

> full authority . . . with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

Tab 12, 1950 NBCWA at 61 [RA 639].

40. During the time that Eastern mined coal, "[s]ubject to the stated purposes of this Fund, the Trustees [had] full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, . . . amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters." Id.

41. As part of the trustees' authority, they explicitly retained the right to modify benefit levels at their discretion:

> Trustee regulations governing Benefits specifically provide that all Benefits which have been authorized are subject to termination, suspension, revision, or amendment by the Trustees in their discretion at any time. . . . The Trustees have full authority within the terms of the Trust Agreement and applicable law to determine the types and amounts of Benefits which shall be granted, and to establish eligibility requirements.

Tab 27, 1958 Report of the 1950 W&R Fund at 20-21 [RA 955-56]. See also Tab 28, 1959 Report of the 1950 W&R Fund at 27-28 [RA 995-96] (same); Tab 29, 1960 Report of the 1950 W&R Fund at 19-20 [RA 1028-29] (same); Tab 30, 1961 Report of the 1950 W&R Fund at 5 [RA 1047] (same); Tab 31, 1962 Report of the 1950 W&R Fund (same) at 5 [RA 1080]; Tab 32, 1963 Report of the 1950 W&R Fund (same) at 5 [RA 1113]; Tab 33, 1964 Report of the 1950 W&R Fund (same) at 8 [RA 1146];

Tab 34, 1965 Report of the 1950 W&R Fund (same) at 18 [RA 1191]; and Tab 35, 1966 Report of the 1950 W&R Fund (same) at 19 [RA 1223].

42. Employers signatory to the 1950 NBCWA, as amended, never promised "lifetime benefits" to the miners. "Resolutions adopted by the Trustees governing Fund Benefits – Pensions, Hospital and Medical Care, and Widows and Survivors Benefits – specifically provide that all these Benefits are subject to termination, revision, or amendment, by the Trustees in their discretion at any time. No vested interest in the Funds extends to any beneficiary." Tab 25, 1955 Report of the 1950 W&R Fund at 4 [RA 869-70] (emphasis added). See also Tab 26, 1956 Report of the 1950 W&R Fund (same) at 30 [RA 929]; Tab 51, Blue Diamond Coal Co. v. Shalala, 174 B.R. 722, 724 (1994) [RA 1771, 1773]; (Fund "promised its beneficiaries no permanent or perpetual benefits. In fact, beneficiaries of this plan were specifically told that benefits were revocable and not vested.").

43. Eligibility for benefits from the 1950 W&R Fund was determined solely by the trustees of that Fund and eligibility requirements were revised at the discretion of the trustees without input from the operators. Tab 27, 1958 Report of the 1950 W&R Fund at 21 [RA 956]. ("Additional eligibility requirements established by the trustees in their discretion govern authorization of all Trust Fund Benefits, and are subject to Trustee revision at any time"). See also Tab 26, 1956 Report of the 1950 W&R Fund at 31 [RA 930] (same); Tab 28, 1959 Report of the 1950 W&R Fund at 28 [RA 996] (same); Tab 29, 1960 Report of the 1950 W&R Fund at 20 [RA 1029] (same); Tab 30, 1961 Report of the 1950 W&R Fund at 5 [RA 1047] (same); Tab 31, 1962 Report of the 1950 W&R Fund at 5 [RA 1080] (same); Tab 32, 1963 Report of the 1950 W&R Fund at 5 [RA 1113] (same); Tab 33, 1964 Report of the 1950 W&R Fund at 9 [RA 1147] (same); Tab 34, 1965 Report of the 1950 W&R Fund at 18 [RA 1191] (same).

44. The explicit authority of the Fund to modify eligibility requirements or terminate benefits was made clear to all

beneficiaries eligible to receive benefits. "With their first check [applicants for Pension and for Widows and Survivors Benefits] are mailed an official notice of Benefit authorization, which states that the Benefit is subject to termination, revision, or amendment at any time." Tab 25, 1955 Report of the 1950 W&R Fund at 9 [RA 875]; Tab 51, In re Blue Diamond Coal Co. 174 B.R. 722 (1994) [RA 1771].

45. Throughout the time that Eastern mined coal, the 1950 W&R Fund's Annual Reports stressed that the Fund had informed the beneficiaries that "Trustee regulations governing Benefits specifically provide that all Benefits which have been authorized are subject to termination, suspension, revision or amendment by the Trustees in their discretion at any time. Each beneficiary is officially notified of this governing provision at the time his Benefit is authorized." Tab 27, 1958 Report of the 1950 W&R Fund at 20-21 [RA 955-56]; Tab 28, 1959 Report of the 1950 W&R Fund at 27 [RA 995]. See also Tab 29, 1960 Report of the 1950 W&R Fund at 19-20 [RA 1028-29] (same); Tab 30, 1961 Report of the 1950 W&R Fund at 5 [RA 1047] (same); Tab 31, 1962 Report of the 1950 W&R Fund at 5 [RA 1080] (same); Tab 32, 1963 Report of the 1950 W&R Fund at 5 [RA 1113] (same); Tab 33, 1964 Report of the 1950 W&R Fund at 8 [RA 1146] (same).

The 1950 W&R Fund Trustees Frequently Modified, Suspended, Or Terminated Benefits

46. The trustees frequently exercised their unilateral authority to modify, suspend, or terminate benefits. During the years that Eastern mined coal, the trustees repeatedly terminated, decreased, or otherwise modified benefits that had previously been paid to beneficiaries. For example, in 1949, the "Trustees authorize[d] a temporary suspension of payments by the Fund to beneficiaries for Pensions, Disability Benefits, Death Benefits, Widows and Orphans Assistance, and for Medical and Hospital Service. . . ." Tab 36, Resolution No. 26 of the 1947 W&R Fund [RA 1230].

47. Also in 1949, "[a]ll benefit payments [were] stopped pursuant to action by trustees." Tab 40, Chronology: Welfare Fund Established at 13 [RA 1313].

48. In 1950, the trustees "rescinded" health benefit coverage for "the treatment of paraplegics and severely handicapped miners at special treatment and rehabilitation centers." Tab 37, Resolution Nos. 12 and 11 of the 1950 W&R Fund [RA 1238, 1235].

49. In 1953, the trustees "rescinded" a "death benefit gratuity of not to exceed" $1,000. Tab 37, Resolution Nos. 25 and 9 of the 1950 W&R Fund [RA 1246, 1231].

50. In 1954, the trustees "rescinded" the provision of "maintenance aid for dependent children and widows" of miners killed in the mines. Tab 37, Resolution No. 35 of the 1950 W&R Fund [RA 1247]. The 1950 W&R Fund had earlier been paying $40.00 per month for "dependent children of deceased miners who are living with their mothers," and $10.00 for each additional child, and $30 for "widows of miners fifty (50) years of age or over who have no dependent children." Tab 37, Resolution No. 16 of the 1950 W&R Fund [RA 1243].

51. In 1954, the trustees "rescinded" the provision of "rehabilitation benefits and maintenance aid to miners." Tab 37, Resolution No. 36 of the 1950 W&R Fund [RA 1248]. The 1950 W&R Fund had earlier been paying a "rehabilitation benefit of $30.00 per month, with an additional $10.00 for their wives and an additional $10.00 for each child under 18 years of age." Tab 37, Resolution No. 14 of the 1950 W&R Fund [RA 1240].

The Trustees Of The 1950 W&R Fund Unilaterally Modified The Eligibility Requirements To Receive Benefits

52. During the time that Eastern mined coal, the trustees also acted unilaterally to modify the eligibility requirements for a variety of benefits whenever the financial situation of the 1950 W&R Fund required, despite the impact on beneficiaries. In an

effort to curtail hospital expenses, in 1957, the 1950 W&R Fund unilaterally implemented changes to procedures for hospital admissions. Tab 27, 1958 Report of the 1950 W&R Fund at 7-12 [RA 943-48].

53. In 1960, the trustees took dramatic steps to "curtail the excess of expenditures over income." Tab 29, 1960 Report of the 1950 W&R Fund at 2 [RA 1011]. To reduce expenditures, the trustees: "limited or terminated eligibility for Trust Fund Benefits," Id.; "limited eligibility of unemployed miners for [Hospital, Medical, and Surgical] services to one year after the date of last regular employment in a classified job in the mine of [a signatory] operator . . . and terminated eligibility of miners for these services even though they may be, or may have been, performing classified work, if self-employed or in any way connected with the ownership, operation, or management of a mine," Id. [RA 1021]; and eliminated "Funeral Expense and Widows and Survivors Benefits" for dependents of a deceased miner if the miner was unemployed for more than a year since his last job with a signatory operator. Id. at 18 [RA 1027].

54. In 1961, the trustees reduced the amount of the monthly pension benefit by 25%. Tab 30, 1961 Report of the 1950 W&R Fund, at 2 [RA 1044].

55. In 1977, the trustees did not implement new benefits called for in the NLCWA because of lack of funding. Tab 38, UMWA Fund Annual Report for the Year Ending June 30, 1977, at 3 [RA 1253].

56. Miners were well aware that the trustees of the 1950 W&R Fund regularly exercised their authority to change, reduce, or eliminate benefits. Tab 41, Coal Commission Report at 23 [RA 1353]; Tab 51, In re Blue Diamond Coal Co. 174 B.R. 722 (1994) [RA 1771].

The Change to a Defined Benefit Plan

57. In 1974, concurrently with the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"),

29 U.S.C. §§1001, et seq., the BCOA and UMWA entered into a new NBCWA ("1974 NBCWA"). The 1974 NBCWA, inter alia, divided the 1950 W&R Fund into four separate trusts: (i) the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Trust") (providing health benefits to miners who retired before January 1, 1976 and their dependents); (ii) the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Trust") (providing health benefits to both active miners and retired miners who retired on or after January 1, 1976 and their dependents); (iii) the UMWA 1950 Pension Plan and Trust ("1950 Pension Trust") (providing pension benefits to miners who retired before January 1, 1976); and (iv) the UMWA 1974 Pension Plan and Trust ("1974 Pension Trust") (providing pension benefits to miners who retired after January 1, 1976). Tab 22, 1974 NBCWA at 83-106 [RA 747-59]. The pension trusts were drawn to comply with ERISA vesting and funding requirements, and thereby abandoned the old pay-as-you-go method of financing pension benefits used by the 1950 W&R Fund.

58. The 1974 NBCWA was the first NBCWA to mention retiree health benefits, and the first to specifically mandate certain benefits from the UMWA welfare and pension funds. Tab 42, Ways and Means Report at 4.[RA 1435]. Among those contractually mandated benefits was a "health card for life" granted by the NBCWA to all UMWA pension recipients and their spouses; spousal health cards terminated upon remarriage. Tab 22, 1974 NBCWA at 105-06 [RA 758-59]. EACC was a signatory to the 1974 NBCWA; Eastern was not. The 1974 NBCWA retained the "tonnage royalty" funding structure of previous NBCWAs for the 1950 Pension and Benefit Trusts, whereby operators paid a certain amount per ton of coal mined to the Funds. The 1974 NBCWA also instituted contributions based on production hours worked by UMWA employees for the 1974 Pension and Benefit Trusts. Tab 22, 1974 NBCWA at 86-92 [RA 749-52].

59. By the late 1970s, in addition to the financial impact of long-term mismanagement of the 1950 W&R Fund by the

UMWA-controlled trustees over the objections of the employer-appointed trustees, a combination of demographic and economic factors began to adversely affect the financial stability of the UMWA Benefit Trusts. These factors included significant reductions in the amount of coal produced under the 1974 NBCWA, the retirement of a generation of miners, the rapid escalation of health care costs, and the mandated benefits created by the 1974 NBCWA. These factors led to the restructuring of the UMWA Benefit Trusts in 1978. See, e.g., Barrick Gold Exploration, Inc. v. Hudson, 823 F.Supp. 1395, 1398-99 (S.D. Ohio 1993), affirmed 1995 WL 73352 (6th Cir. February 24, 1995); LTV Steel Co., Inc. v. Shalala (In re Chateaugay), 163 B.R. 955, 957 (S.D.N.Y. 1993) ("LTV"), appeal docketed, No. 94-6024 (2nd Cir. Jan. 18, 1994); see also Tab 42, Ways and Means Report at 33-36 [RA 1464-67]; Tab 41, Coal Commission Report at 42-49 [RA 1372-79]; Blankenship v. Boyle, 329 F. Supp. 1089 (1971), affirmed 511 F.2d 447 (1975) (gross mismanagement of Fund by controlling UMWA trustees from inception of Fund through 1971).

60. The 1950 W&R Fund was severely affected by decades of mismanagement by the UMWA and neutral trustees who violated their fiduciary duties to the Fund beneficiaries in favor of the UMWA. "Conflicts of interest were openly tolerated and their implications generally ignored. ... The Fund proceeded without any clear understanding of the trustees' exclusive duty to the beneficiaries, and its affairs were so loosely controlled that abuses, mistakes and inattention to detail occurred. ..." Blankenship v. Boyle, 329 F. Supp. 1089, 1095 (1971), affirmed 511 F.2d 447 (1975). The major breach of trust was the trustees' failure to invest "enormous cash balances" in interest-bearing accounts, choosing instead to leave them on deposit with a UMWA-controlled bank "on demand to the Bank's advantage but earning nothing for the Fund. This practice continued in spite of suggestions from successive Operator trustees that the money should be used to earn income for the beneficiaries." Id. at 1096. The decision to engage in these breaches of fiduciary duty was made "contemporaneously with the creation of the

Fund," Id. at 1099; the UMWA and "neutral" trustees, "rather than replying to [the employer-appointed trustee's] repeated complaints [regarding the failure to invest and conflicts of interest] ignored his protests altogether." Id. at 1100. In fact, "often matters of considerable import were resolved between meetings by [the UMWA and the "neutral" trustee] without even consulting the Operator trustee." Id. at 1095.

61. In 1978, the BCOA and the UMWA executed a new NBCWA that restructured the 1974 Benefit Plan ("1978 NBCWA") (Tab 23) [RA 766]. The 1978 NBCWA required its employer signatories to provide health care coverage directly to their own active employees and to their retirees in the 1974 Pension Trust assignable (under contract criteria) to those employers. The 1974 Benefit Trust was left to provide health care coverage to those UMWA pensioners in the 1974 Pension Trust whose employers were no longer in business. Tab 23, 1978 NBCWA at 95-96 [RA 778-79]. The Trusts continued to be funded by tonnage royalty payments, as well as per hour worked premiums instituted by the 1974 NBCWA. Tab 23, 1978 NBCWA at 98 [RA 780].

62. The 1978 NBCWA also adopted the "Evergreen Clause," which has been interpreted by at least one federal court as requiring employers participating in the 1978 or later NBCWAs to continue paying royalties to the two UMWA Benefit Plans, at the prevailing NBCWA rate, even if the employer did not participate in succeeding NBCWAs. In re UMWA Employee Benefit Plans Litigation, 782 F.Supp. 658 (D.D.C. 1992), certified for interlocutory appeal, 793 F.Supp. 339; aff'd, 1993 U.S. App. Lexis 1595 (D.C. Cir. 1993). The "evergreen" clause provides:

> Any Employer who employed any Participant eligible for coverage under, or who received or receives benefits under, the 1950 [1974] Benefit Plan and Trust, or any Employer who was or is required to make, or who has made or makes contributions to the 1950 [1974] Benefit Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 [1974] Benefit Trust, as amended from time to time, including, but not limited to making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.

Id.

63. The 1978 NBCWA also adopted, for the first time, a "guarantee" clause in which the BCOA signatories to the 1978 NBCWA agreed to guarantee sufficient funding for UMWA Benefit Plan medical costs. See UMWA 1950 Benefit Plan and Trust v. Bituminous Coal Operators' Ass'n, 898 F.2d 177, 181 (D.C. Cir. 1990). That clause, which has been included in every subsequent NBCWA, including the 1988 NBCWA, reads:

> **Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts**
>
> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.
>
> In order to fully fund these guaranteed benefits, the BCOA may increase, not decrease, the rate of contributions to be made . . .. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

Tab 23, 1978 NBCWA at 113-14 [RA 787-88]; Tab 24, 1988 NBCWA at 141-42 [RA 827-28] (boldface in originals). The effect of all these changes was to convert the defined contribution obligation of the BCOA signatories into a defined benefit obligation.

64. In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts continued to be plagued by a number of factors, including spiraling health care costs, withdrawal of 1974 and

1978 signatory operators from the Trusts (thereby "dumping" their retirees into the 1974 Benefit Trust), and several judicial decisions increasing the Trusts' beneficiary population without corresponding increases in coal operator contributions. See, e.g., Tab 42, Ways and Means Report at 14-21 [RA 1445-52]; Tab 41, Coal Commission Report at 55-57 [RA 1384-86]; see also LTV 163 B.R. at 957; Barrick Gold, 823 F.Supp. at 1398-99; United Mine Workers of America v. Nobel, 720 F.Supp. 1169, 1174 (W.D. Pa. 1989), aff'd without opinion, 902 F.2d 1558 (3d Cir. 1990), cert. denied, – U.S. –, 111 S.Ct. 1102 (1991) (holding that the 1974 NBCWA promised lifetime health care to UMWA beneficiaries and had to serve as a safety net for any beneficiaries whose last employer was no longer obligated to provide benefits under a NBCWA); United Mine Workers of America v. Royal Coal Co., 768 F.2d 588 (4th Cir. 1985) (holding that employers had no obligation to contribute to the Funds past the expiration of the NBCWA to which they were signatory).

65. As more coal operators who had signed the 1978 NBCWA ceased contributing to the UMWA Benefit Trusts, their withdrawal forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees. These rising costs, in turn, created a downward spiral whereby still-contributing 1978 NBCWA signatory operators were themselves pressured to withdraw from the trusts – further shrinking the contribution base for a growing beneficiary population. Taken together, these forces threatened the financial stability of the UMWA Trusts. As the Combined Fund states,

> "One of the most important [factors leading to the 1950 and 1974 Funds' financial crisis] was that numerous coal companies that had signed the 1978 NBCWA (and, frequently, subsequent NBCWAs as well) attempted in the 1980s to avoid responsibility for contributing to the costs of health coverage for UMWA retirees and their dependents. These companies terminated their participation in the 1950

> and 1974 Benefit Funds and 'dumped' the retirees that they were then covering through individual employer plans into the 1974 Benefit Fund."

Amended Counterclaim of UMWA Combined Funds, ¶ 10 [RA 89-90].

66. The UMWA and various coal operators entered into another NBCWA in 1988 that provided, for the first time, that signatories who stopped contributing to the Funds – either because there was no successor NBCWA or because the company went out of the coal business – were required to make a substantial lump sum payment to the Funds. Tab 24, 1988 NBCWA at 142-45 [RA 828-29]; Tab 42, Ways and Means Report at 5 [RA 1436]. The 1988 NBCWA continued to provide for tonnage royalty payments from employers, as had all previous NBCWAs. As well, the 1988 NBCWA continued the per-hour contributions first instituted by the 1974 NBCWA. Tab 24, 1988 NBCWA at 125-35 [RA 819-24].

67. By 1990, the 1950 and 1974 Benefit Trusts had incurred a debt of over $100 million and their funding bases were declining faster than their respective beneficiary populations. The Trusts' ability to continue to provide health care benefits first mandated by the 1974 and 1978 NBCWAs was jeopardized, and the issue of retiree health care benefits had already contributed to a protracted strike at the Pittston Coal Company, a signatory to the 1978 NBCWA. See 138 Cong. Rec. §3437 (daily ed. Mar. 12, 1992) (statement of Sen. Byrd); Tab 41, Coal Commission Report at vii, 1, 3-4, 26-27 [RA 1324, 1332, 1334-35, 1356-57]; see also 136 Cong. Rec. §12312 (daily ed. Oct. 2, 1989) (statement of Sen. Rockefeller).

The Coal Act

68. On March 12, 1990, Secretary of Labor Elizabeth Dole created the Coal Commission and asked it to "examine the problem and to recommend a solution for assuring that orphan retirees in the 1950 and 1974 Benefit Trusts will continue to receive promised medical care." Tab 41, Coal Commission Report at 2 [RA 1333]. As one Coal Commission member noted, much of the deficit of the UMWA Funds "is attributable to 'orphaned' retirees whose companies have gone out of business or ceased paying health benefits. More than half of the Fund's population is composed of orphan retirees. How to continue to provide health benefits to 'orphans' is the essence of the problem." Tab 41, Coal Commission Report at vii [RA 1324].

69. The Coal Commission proposed "two alternative approaches for a possible long-term solution" to the perceived funding difficulties of the 1950 and 1974 Benefit Funds. Id. at viii [RA 1325]. The first proposal was an "industry-wide" tax on coal operators. Id. at 65 [RA 1394]. The second proposal was to "reach back" to impose liability on signatories of the 1978 and subsequent NBCWAs. Id. at 63 [RA 1392]; Tab 51, In re Blue Diamond Coal Co., 174 B.R. 722 (1994) [RA 1774] ("The report did not suggest that pre-ERISA signatories of NBCWAs . . . had ever promised lifetime benefits or that they should be included in the 'reach back' provision").

70. In the wake of the Coal Commission Report, Congress considered a series of proposed solutions to fund the provision of UMWA retiree health care benefits, ranging from an industry tax to funding requirements for present signatories and on a reachback provision for 1978 and later NBCWA signatories. As a result of a Senate floor amendment, however, Congress extended the Coal Act to every coal operator which had signed any coal wage agreement from 1946 forward to make contributions to a new statutory benefit fund. Tab 42, Ways and Means Report at 52-56 [RA 1483-87]; Coal Act §§ 9701(b)(1), (c)(5). "In other words, the legislation goes

beyond the reachback suggested by the Coal Commission, which would have involved only post-ERISA signatories of collective bargaining agreements, to encompass coal companies . . . that have not signed NBCWAs since well before ERISA required vested benefits." Tab 51, In re Blue Diamond, 174 B.R. at 725 [RA 1774].

71. The Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") was passed by Congress as part of the comprehensive Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776. It rests on the legislative finding that:

> [I]n order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Energy Policy Act § 19142(a)(2), 26 U.S.C. § 9701 note (emphasis added).

72. In determining which companies would be required to contribute, Congress acted under the mistaken assumption that every signatory to any NBCWA since 1946 had made an unqualified "promise" to provide lifetime health benefits to UMWA retirees. See 138 Cong. Rec. S10,784 (daily ed. July 29, 1992) (statement of Sen. Byrd) ("[t]his amendment . . . says that when promises are made, promises will be kept"); id. at S10,785 (statement of Sen. Byrd) (Act's goal is "to protect the retirees who were promised lifetime benefits"); id. at S10,786 (statement of Sen. Wofford) ("retired miners are entitled to the health care benefits they were promised").

73. The Coal Act created three funding mechanisms, only one of which is at issue here: the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. §§ 9702, 9711, 9712. The Combined Fund is the result of a statutory merger of the 1950 Benefit Fund and the 1974 Benefit Fund. Id. § 9702(a)(2).

74. The Combined Fund is financed by three transfers of $70 million from the 1950 Pension Fund, by subsequent transfers of unspecified amounts from the Abandoned Mine Reclamation Fund, and by health insurance premiums and death benefit premiums paid by each "assigned operator." Id. § 9705. Under the Coal Act, a signatory to any NBCWA since 1946 may be an "assigned operator." Id. § 9701(c)(5).

75. Unlike operators' obligations to contribute to the 1950 W&R Fund, which were based on a flat rate multiplied by the tonnage of coal mined or purchased, the Coal Act requires signatory operators to contribute on a "per beneficiary" basis. 26 U.S.C. § 9704(b).

76. Premium amounts must be sufficient to maintain the same level of benefits for retired UMWA miners, and their surviving spouses and dependents, as were provided under the 1988 NBCWA. Id. § 9703(b). Premiums must be paid every year until all beneficiaries have died or otherwise ceased to be eligible. Id. § 9704. Comparisons of benefits paid by the funds with those offered under other large group plans "highlight both the generosity of the UMWA benefit package and the absence of significant beneficiary cost-sharing requirements. These features remain essentially unchanged under [the Coal Act]." Tab 42, Ways and Means Report at 95 [RA 1526].

77. Beneficiaries were "assigned" by the Secretary of Health & Human Services ("Secretary") through the Social Security Administration ("SSA"), in theory according to the beneficiaries' degrees of prior employment with a signatory to any NBCWA since 1946. Id. § 9706(a),(b)(1). When the money transferred from the UMWA 1950 Pension Plan and the Abandoned Mine Reclamation Fund has been expended, each assigned operator will also be assessed a proportionate premium to pay for the costs of health benefits for "unassigned beneficiaries," i.e., "orphans" whose former employer, or any company related to the former employer, is no longer in business of any kind. Id. § 9704(d), (f).

78. The Combined Fund is included in the Federal budget. Premiums that companies must pay to the Combined Fund are treated as revenues of the Federal Government (as "miscellaneous governmental receipts") and the expenditures of the Combined Fund as Federal outlays. Budget specialists in both the congressional and executive branches concurred in scoring the Combined Fund as on-budget. Tab 54, Nonna A. Noto, Budget Treatment of the UMWA Retiree Health Benefit Program, Congressional Research Service Report for Congress (93-979 E, November 10, 1993) [RA 1817].

Eastern Never "Dumped" Miners -- EACC Continued Contributions at the Same or Higher Levels

79. The "promise" of lifetime benefits was first made by the members of the BCOA in the 1974 NBCWA and funding was first guaranteed in the 1978 NBCWA. Tab 41, Coal Commission Report at 63 [RA 1392]; Tab 51, In re Blue Diamond, 174 B.R. at 725, 726 [RA 1774, 1775]. Eastern extended neither that promise nor that guarantee, as Eastern had ceased mining coal in 1965, and was not a signatory to any NBCWA from 1966 on. EACC, Eastern's successor, was a signatory to all relevant NBCWAs, including the 1974, 1978 and 1988 NBCWAs. See Tabs 22-24 (1974, 1978 and 1988 NBCWAs) [RA 737, 766, 805].

80. In 1966, after Eastern had ceased mining coal and transferred all its coal operations to EACC, the 1950 W&R Fund had a positive balance of $145,021,431. Tab 35, 1966 Report of the 1950 W&R Fund at 3 [RA 1207]. As of June 30, 1992, the Benefit Funds had accumulated a deficit of almost $100 million: The 1950 Benefit Fund had a deficit of $86,179,000, Tab 39, UMWA Fund Annual Report for 1992 at 27 [RA 1292], and the 1974 Benefit Fund had a deficit of $10,777,000. Id. at 37 [RA 1301]. The Coal Act was enacted to remedy the deteriorating financial condition of the 1950 and 1974 Benefit Funds.

81. By 1966, when EACC succeeded Eastern, Eastern had contributed more than $50 million to the 1950 W&R Fund and had satisfied all its obligations under the NBCWAs to which it was a signatory. Tab 45, Supplemental Affidavit of James J. Harper , ¶ 5 [RA 1569].

82. From 1966 forward, EACC continued to operate the mines it acquired from Eastern until the reserves were depleted or the mining operations became uneconomical. As well, EACC opened and purchased additional mines after it acquired Eastern's coal operations. By 1986, EACC was operating more mines in West Virginia and Pennsylvania than had Eastern at the time it ceased mining operations, and EACC was mining at least as much coal as had Eastern in 1965. EACC used UMWA miners in its mines, and continued to make payments to the UMWA funds throughout this time. Tab 44, Supplemental Affidavit of Robert H. Freeman [RA 1565]; Tab 45, Supplemental Affidavit of James J. Harper [RA 1568].

83. The Combined Fund, according to its October 31, 1994 Financial Statements, is now in sound financial condition. The Combined Fund reported total assets of $248,388,000 as compared to total liabilities of $71,525,000, for net assets of $176,863,000. UMWA Combined Benefit Fund Financial Statements, October 31, 1994.

84. According to the Combined Fund's information as of October 1, 1994, there were 80,061 beneficiaries assigned to current and former signatory operators for the period starting February 1, 1993. With the addition of the 24,787 orphans and 2,201 beneficiaries whose reassignments are pending, there were 107,049 beneficiaries eligible for benefits from the Combined Fund. Fewer than 7,600 of the beneficiaries of the Combined Fund were assigned to "Super Reachback" operators, i.e., companies such as Eastern that last signed an NBCWA prior to 1978. Tab 43, Combined Fund's' Response to Request from Senator Rockefeller at 7 [RA 1562].

85. Of the 107,049 eligible beneficiaries, only 29.21% are pensioners or disabled miners; the remaining 70.79% are either surviving spouses of retired mine workers or dependents of miners or surviving spouses. Tab 43, Combined Fund's Response to Request from Senator Rockefeller at 6 [RA 1561]. Of the beneficiaries assigned to Eastern, 75% of them are either surviving spouses of retired mine workers or dependents of miners or surviving spouses. Tab 46, Supplemental Affidavit of George J. Rose [RA 1570].

SSA Assignment Process

86. In October, 1993, SSA, acting on behalf of the Department of Health and Human Resources, notified Eastern that it had assigned Eastern liability for the payment of health and death benefit premiums under the Coal Act for 2323 coal industry retirees and dependents. Later that month, the UMWA Combined Benefit Fund (the "Combined Fund") notified Eastern that it had assessed Eastern premiums for 1494 beneficiaries for an initial eight month period and for 1430 beneficiaries for the following twelve months. The resulting liability translates into a total liability, calculated on an actuarial basis, in excess of $100 million. Tab 5, Affidavit of James J. Harper, ¶ 5 [RA 592].

87. In connection with its administration of the Coal Act, SSA promulgated a series of interpretive guidelines to assist SSA employees in making beneficiary assignments. The guidelines include Transmittal No. 7 (SSA Pub. No. 68-0101402) (August 1993) ("Transmittal No. 7") (Tab 47) [RA 1573], and Transmittal No. 9 (SSA Pub. No. 68-0101402) (Jan. 1994) ("Transmittal No. 9") (Tab 49) [RA 1621].

88. SSA promulgated Transmittal No. 7 prior to the assignment of any beneficiaries to Eastern. At page RM

T01402.001C [RA 1578], Transmittal No. 7 provides as follows:

> Before October 1, 1993, SSA is to decide which mining operator shall be responsible for the premiums of each eligible beneficiary . . . . In making this decision, SSA must disregard periods when the employer was not a signatory to the agreement. If the mine operator is out of business, SSA must then determine whether there is a "related person (successor or jointly controlled business) of the mine operator. If so, the related business may be found responsible for the annual premiums payable to the Fund.

89. In Transmittal No. 9, SSA specified procedures for determining whether a successor company to a signatory operator is responsible for obligations under the Coal Act that would otherwise be assigned to the prior operator. Transmittal No. 9 states:

- "[a] successor is a replacement; one who follows or comes into place of another. The term is applied to a sole corporation or to any corporation. *A corporation may be considered the successor of another, although both corporations retain their corporate identity.* This status may exist in the absence of either a merger, amalgamation or technical consolidation. The status depends on the facts and surrounding circumstances." Tab 48, Transmittal No. 9 at RM T01402.051-3 [RA 1625-26] (underline in original; italics added);

- "[a] company is a successor company if it is a signatory to an UMWA coal wage agreement and either: *Expressly assumed health and death benefit obligations of retired persons last employed by the predecessor company by (for example): payment of health care bills or death benefits; or execution of a contract with a health carrier providing coverage for such persons; or implicitly assumed these obligations through promises of coverage or similar acts.*" Id. [RA 1626] (underline in original; italics added);

- "[i]f no explicit or implicit assumption of obligations has occurred, then a company is a successor company if: the new company has signed an UMWA wage agreement; and a majority of the employees presently working for the successor company formerly worked for the predecessor company; and the location is the same geographical area and the work functions have continued relatively unchanged; and operations are/were not suspended for longer than six months (not counting a strike period); and either there has been a transfer of a substantial proportion of the assets of the predecessor company to the successor company; or the successor company is owned and operated by substantially the same people who owned and operated the predecessor company." Id. [RA 1626-27] (underline in original).

90. On April 27, 1994, Eastern submitted a written request to SSA for guidance on a number of procedural issues, including the process for requesting relief from the Coal Act based on the fact that an existing company had succeeded to Eastern's coal-related liabilities. Among other things, Eastern highlighted that: (1) it had transferred its coal operations, including all assets and liabilities (with the exception of several leases), to EACC in 1966; (2) that EACC had been sold to Peabody Coal Corp. in 1987; (3) that all industry and personnel records of Eastern's coal operations had been transferred to EACC, and remained with EACC after its sale to Peabody; and (4) that SSA publications indicated that Eastern could obtain relief from the Coal Act by showing that a successor company to Eastern's coal operations existed. Tab 1, Letter from Eastern to SSA dated April 27, 1994 [RA 160].

91. On May 26, 1994, SSA responded to Eastern's April 27, 1994 letter. SSA stated that "if Eastern Enterprises presents us with prima-facie evidence that its status is such that no assignments should be made to it (for example, Eastern was not a signatory, was not in business when the assignment was made,

or transferred the mining operations to another company which ought to be the assignee) SSA will rescind the previous assignments and reassign the miners involved to the proper assignee." Tab 2, Letter from SSA to Eastern dated May 26, 1994 at 2-3 [RA 170-71]. (emphasis added).

92. On June 17, 1994, Eastern submitted its Request for Reassignment of Beneficiaries to Eastern Associated Coal Corp. The Request was supported by a memorandum of law and factual materials, including affidavits and relevant documents. Tab 3 (Memorandum in Support) [RA 172]; Tab 4 (Materials in Support) [RA 199].

93. After Eastern submitted its Request for Reassignment of Beneficiaries to Eastern Associated Coal Corp., SSA informed Eastern that SSA would not consider the Request until Eastern submitted its challenges to individual beneficiary assignments. On September 9, 1994, Eastern sent SSA its main submission in support of its request for review; this submission comprised thirty-four bankers' boxes addressing errors in individual assignments. Eastern noted that it had requested that all beneficiaries assigned to Eastern be reassigned to EACC as the successor to Eastern's coal operations.

94. On December 13, 1994 Eastern reiterated its request for review on "successor company" grounds, which had been submitted six months before on June 17, 1994. Tab 6, Letter from Eastern to SSA dated December 13, 1994 [RA 593]. As well, Eastern requested clarification of a number of aspects of the procedures by which a successor company challenge would be reviewed. (Tab 6) [RA 594].

95. On January 18, 1995, SSA responded to Eastern's September 9, 1994 submission and Eastern's December 13, 1994 letter (posing specific questions concerning SSA's treatment of the successor company issue). Tab 7, Letter from SSA to Eastern dated January 18, 1995 [RA 597]. SSA stated that "the Coal Act does not specifically provide for assignment of beneficiaries to successors of signatory operators." Tab 7 at 1

[RA 597]. SSA stated that it would assign beneficiaries to a successor to a signatory operator, but only if the signatory operator were no longer in business. Tab 7 at 2 [RA 598]. SSA stated that "if the employing company is no longer in business, we look to related companies, including successors, to assign beneficiaries." Tab 7 [RA 598]. SSA further stated that "if a signatory operator went out of business prior to the effective date of the Coal Act leaving a 'successor company' to continue former operations, the successor company is considered to have assumed the signatory operator's past liabilities for assignment purposes. However, if a signatory operator sells its assets under a sale agreement but remains in business, any provision concerning responsibility for past liabilities is considered a private agreement between the two parties. As such, SSA would disregard such a provision in making assignments under the Coal Act if the signatory operator is still in business." Tab 7 at 4 [RA 600].

96. SSA based its decision to deny relief on successor company grounds on Coal Act Supplemental Coal Act Review Instructions #3, which were created in December, 1994 ("Supplemental Instructions #3"), and which were directed to SSA personnel reviewing requests for review; Supplemental Instructions #3 state that "[a]n assigned signatory operator may allege it is not responsible under the Coal Act because it sold all of its mining operations to another (successor) company. After you determine that the purchaser meets the criteria for a 'successor' company, and the 'business status' of both the assigned operator and the 'successor' company, then use the following guidelines to determine the appropriate assignee under the Coal Act." Tab 49, Supplemental Instructions #3 at 35 [RA 1741]. Supplemental Instructions #3 go on to state that SSA will assign beneficiaries to successors, but only if the predecessor company is no longer "in business" according to complex criteria set out elsewhere in Supplemental Instructions #3.

97. On January 30, 1995, SSA sent Eastern SSA's first decision regarding an individual request for review. In that

decision, SSA denied Eastern's request that Samuel E. East (a deceased miner) and Josephine East be reassigned to EACC as Eastern's successor. The SSA stated "the 1966 reorganization of [Eastern's] mining assets into a subsidiary, Eastern Associated Coal Corporation, did not constitute a transfer of [Eastern's] liability for Coal Act assignments for past periods. The transfer could not establish Eastern Associated Coal Corporation as a 'successor' because [Eastern] remained in business." Tab 8, Letter from SSA to Eastern, dated January 30, 1995, at 2 [RA 603]. SSA stated that this decision was final. Id.

EASTERN ENTERPRISES,
by its attorneys,

/s/John T. Montgomery, (BBO #352220)

/s/Ellen Solomon-Gonzales, (BBO# 565041)

/s/William S. Elias, (BBO# 563626)
ROPES & GRAY
One International Place
Boston, Massachusetts 02110-2624
(617) 951-7000

Dated: March 15, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

DEFENDANT UMWA COMBINED FUND
AND ITS TRUSTEES' RESPONSE TO
PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Local Rule 56.1, Defendants United Mine Workers of America Combined Benefit Fund and its Trustees (the "Combined Fund"), by their undersigned counsel, hereby submit their response to Plaintiff's Statement of Material Facts As To Which There Is No Genuine Issue ("Plaintiff's Statement"). Plaintiff s Statement is a 35-page tome that consists consisting of 97 paragraphs, many of which contain legal conclusions or counsel's characterizations, rather than statements of fact. To the extent Plaintiff's Statement does contain factual assertions, many of these assertions are immaterial to any issues involved in this action. Nor does Plaintiff even represent that its factual assertions were included in the administrative record on which the Secretary based her assignment decisions. Moreover, Plaintiff's Amended Complaint, which alleges for the first time the only claim to which the present motion for summary judgment is directed, has only recently been filed. None of the parties has taken any discovery with respect to Plaintiff s new claim. If the Court were to conclude (contrary to the Trustees' view) that any of Plaintiff s newly asserted facts are material to the legal issue presented for decision, then all defendants including the Secretary, as well as the Trustees) would be entitled to explore these matters in discovery before any adverse decision on the meaning of the Coal Act could issue. Nevertheless, without conceding that any of the so-called facts set forth in Plaintiff's Statement are material, the Combined Fund responds as follows:

1. On information and belief, the Combined Fund admits that Plaintiff was organized in 1929 as a Massachusetts business trust. Also on information and belief, the Combined Fund admits that Plaintiff owned several subsidiary entities and maintained coal operations in West Virginia and Pennsylvania through its coal division.

2. The Combined Fund admits that Plaintiff created a wholly-owned subsidiary named Eastern Associated Coal Corp. ("EACC") in 1963. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 2 of Plaintiff's Statement.

3. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in paragraph 3 of Plaintiff's Statement.

4. The Combined Fund neither admits nor denies the allegations set forth in paragraph 4 of Plaintiff's Statement and instead relies on the documents set forth therein to speak for themselves.

5. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in the first sentence of paragraph 5 of Plaintiff's Statement. The remaining allegations set forth in paragraph 5 are conclusions of law and therefore are neither admitted nor denied. Finally, the Combined Fund relies on the document cited in paragraph 5 to speak for itself.

6. The Combined Fund neither admits nor denies the allegations set forth in paragraph 6 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

7. The Combined Fund neither admits nor denies the allegations set forth in paragraph 7 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

8. The Combined Fund neither admits nor denies the allegations set forth in paragraph 8 of Plaintiff's Statement and

instead relies on the documents cited therein to speak for themselves.

9. On information and belief, the Combined Fund admits that Plaintiff, through its wholly-owned subsidiary, EACC, continued the mining operations that previously had been performed by Plaintiff's coal division. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 9 of Plaintiff's Statement.

10. The Combined Fund neither admits nor denies the legal conclusion that EACC was Plaintiff's "successor". Moreover, the Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 10 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

11. The Combined Fund neither admits nor denies the allegations set forth in paragraph 11 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

12. The allegations set forth in the first sentence of paragraph 12 of Plaintiff's Statement are legal conclusions to which no response is required. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 12.

13. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 13 of Plaintiff's Statement.

14. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in paragraph 14 of Plaintiff's Statement.

15. The allegations set forth in the first sentence of paragraph 15 of Plaintiff's Statement are legal conclusions to which no response is required. The Combined Fund neither admits nor denies the remaining allegations set forth in

paragraph 15 and instead relies on the document cited therein to speak for itself.

16. The Combined Fund admits that EACC was signatory to a series of successive collective bargaining agreements with the United Mine Workers of America that obligated it to pay contributions to the United Mine Workers of America Welfare and Retirement Fund of 1950. The remaining allegations set forth in paragraph 16 of Plaintiff's Statement are legal conclusions to which no response is required.

17. The characterization that EACC was Plaintiff's "successor" is a legal conclusion to which no response is required. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 17 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

18. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in paragraph 18 of Plaintiff's Statement.

19. On information and belief, the Combined Fund admits that Plaintiff currently owns Boston Gas, Midland Enterprises, Inc., and WaterPro Supplies Corporation. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 19 of Plaintiff's Statement.

20. On information and belief, the Combined Fund admits the allegations set forth in the first sentence of paragraph 20 of Plaintiff's Statement. The allegations set forth in the second sentence of paragraph 20 are legal conclusions to which no response is required.

21. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in paragraph 21 of Plaintiff's Statement.

22. The allegations set forth in paragraph 22 of Plaintiff's Statement concerning the responsibility of Eastern and EACC towards their retirees are legal conclusions to which no response

is required. The Combined Fund is without sufficient knowledge to admit or deny the remaining allegations set forth in paragraph 22.

23. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in paragraph 23 of Plaintiff's Statements. Moreover, the Combined Fund relies upon the document cited therein to speak for itself.

24. The Combined Fund is without sufficient knowledge to admit or deny the allegations set forth in the first sentence of paragraph 24 of Plaintiff's Complaint. The Combined Fund admits the remaining allegations set forth in paragraph 24.

25. The Combined Fund admits the allegations set forth in paragraph 25 of Plaintiff's Statement.

26. The Combined Fund admits that the welfare and retirement fund created by the Krug-Lewis Agreement, known as the UMWA Welfare and Retirement Fund of 1946 (the 1946 W&R Fund"), was intended to make "payments to miners, and their dependents and survivors, with respect to: (i) wage loss not otherwise compensated at all or adequately under the provisions of Federal or State law and resulting from sickness (temporary disability), permanent disability, death, or retirement, and (ii) other related welfare purposes, as determined by the trustees" of the 1946 W&R Fund." The Combined Fund also admits that the UMWA Medical and Hospital Fund was designed to "provide, or to arrange for the availability of, medical, hospital and related services for the miners and their dependents." The Combined Fund further states that, as set forth in the Krug-Lewis Agreement, the federal government and the UMWA expressly agreed to "coordinate the development of policies and working agreements necessary for the effective operation of each fund" so that "each fund [would], to the maximum degree practicable, operate to complement the other." The Combined Fund denies that the 1946 W&R Fund did not provide medical care benefits to beneficiaries. The 1946 W&R Fund became operational in or

about May, 1947. At that time, its board of trustees approved a $1.000.00 death benefit payable to the beneficiaries of each member of the UMWA who died on or after June 1, 1946. The first death benefit checks were issued to the families of miners killed in a mine explosion in Centralia, Illinois. The trustees also began developing a rehabilitation program to provide for the care and treatment of paraplegic and severely disabled miners, many of whom had received inadequate medical care. The trustees likewise began developing a medical care program to provide health and medical benefits to all active and retired UMWA miners and their dependents. In its nascent stage, this program consisted of the payment of disability and maintenance aid on a month-to-month basis to miners and their dependents in order to alleviate cases of acute distress until the Fund's pension and hospital and medical programs became fully operational.

27. The Combined Fund admits the allegations set forth in paragraph 27 of Plaintiff's Statement. The Combined Fund denies, however, any implication that the Medical and Hospital Fund provided benefits only to active miners and not to retirees.

28. The Combined Fund admits the allegations set forth in paragraph 28 of Plaintiff's Statement.

29. The Combined Fund denies the allegations as stated in paragraph 29 of Plaintiff's Statement. The Combined Fund states, however, that 1947 NBCWA required that the 1946 W&R Fund and the UMWA Medical and Hospital Fund be merged into a new multiemployer benefit fund (the "1947 W&R Fund"). Like its predecessors, the 1947 W&R Fund was established to make payments to UMWA miners and their dependents for a broad range of benefits. These benefits included the payment of medical and hospital expenses, pensions, compensation for work-related injuries or illnesses, death benefits, and disability benefits.

30. The Combined Fund neither admits nor denies the allegations set forth in paragraph 30 of Plaintiff's Statement and

instead relies on the documents cited therein to speak for themselves.

31. The Combined Fund neither admits nor denies the allegations set forth in paragraph 31 of Plaintiff's Statement and instead relies on the terms of the 1947 NBCWA to speak for themselves.

32. The Combined Fund neither admits nor denies the allegations set forth in the first two sentences of paragraph 32 of Plaintiff's Statement and instead relies on the terms of the 1947 NBCWA to speak for themselves. The allegations set forth in the third sentence of paragraph 32 are legal conclusions to which no response is required.

33. The Combined Fund neither admits nor denies the allegations set forth in paragraph 33 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves. Moreover, no response is required to the legal conclusions set forth in paragraph 33.

34. The Combined Fund admits the allegations set forth in the first sentence of paragraph 34 of Plaintiff's Statement. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 34 and instead relies on the terms of the 1948 NBCWA to speak for themselves.

35. The Combined Fund admits the allegations set forth in the first sentence of paragraph 35 of Plaintiff's Statement. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 35 and instead relies on the terms of the 1950 NBCWA to speak for themselves.

36. The Combined Fund admits the allegations set forth in the first sentence of paragraph 36 of Plaintiff's statement. On information and belief, the Combined Fund admits the allegations set forth in the second sentence of paragraph 36. The Combined Fund neither admits nor denies the allegations set forth in the third sentence of paragraph 36 and instead relies on

the terms of the 1951 amendment to the 1950 NBCWA to speak for themselves.

37. The Combined Fund admits the allegations set forth in the first sentence of paragraph 37 of Plaintiff's Statement. The Combined Fund neither admits nor denies the allegations set forth in the second sentence of paragraph 37 and instead relies upon the documents cited therein to speak for themselves. Finally, although on information and belief the Combined Fund admits that Plaintiff was not directly signatory to the terms of an NBCWA after 1965, the allegation that it was not signatory to any NBCWAs subsequent to that date through its 100% ownership of EACC, is a legal conclusion to which no response is required.

38. The Combined Fund admits that the UMWA and BCOA entered into successor NBCWAs in 1966, 1968 and 1971. The Combined Fund neither admits nor denies the allegations set forth in paragraph 38 of Plaintiff's Statement concerning the scope and extent of health and medical coverage set forth in those agreements and instead relies upon the terms of those agreements to speak for themselves. The remaining allegations set forth in paragraph 38 are legal conclusions to which no response is required.

39. The Combined Fund denies the allegations set forth in paragraph 39 of Plaintiff's Statement. As the Coal Commission and several federal courts have found, NBCWA signatory employers fostered retired miners' and their dependents' legitimate expectations of lifetime health care as early as 1950. For example, Charles A. Owen, the coal operators' designated trustee of the 1950 W&R Fund informed the coal operators that were signatory to the 1950 NBCWA that the Fund provided for the payment of "Hospitalization, Surgical and Medical Care for mine worker [sic], including pensioners and dependents during his life, without limit as to duration[.]" C.F. Exh. 3. (emphasis

supplied) [RA 1972]*. Likewise, in a 1953 speech, Joseph E. Moody, the president of the Southern Coal Producers Association, acknowledged that the beneficiaries of the 1950 W&R Fund had been1 "promised" and had "grown accustomed to" receiving the benefits provided by the 1950 W&R Fund. C.F. Exh. 4 [RA 2000].

Similarly, federal courts consistently have held that the UMWA retirees are entitled to lifetime health benefits. For example, in United Mine Workers of America v. Nobel, 720 F. Supp. 1169 (W.D. Pa. 1989), aff'd without opinion, 902 F.2d 1558 (3d Cir. 1990), cert. denied, 499 U.S. 904 (1991), the court held that:

> The language of the plan benefits contained in the past five collective bargaining agreements between the UMWA and the BCOA, providing that a pensioner 'will be entitled to a health services card for life,' together with the 25-year history of lifetime benefits prior to 1974, and the testimony of the parties of record establish that the parties intended to provide health benefits to the individual plaintiffs for life. We find that the language confers a right to benefits for the lifetime of the pensioner.

Id. at 1178 (emphasis added). The court in Nobel also found that

> [p]ension benefits for retired miners were provided beginning in 1947, under the previous trust, and health benefits were provided to retired miners beginning no later than 1950. The pension and health benefits for retired miners were provided throughout the life of the miner. The eligibility of the retired miner to receive pension and health benefits from the 1950 Fund was not affected by whether the last employer

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* **[Petitioner's Note**: supplementary citations have been added to this Statement of Facts to allow the Court to cross-reference the materials to the Record Appendix prepared for the First Circuit. Such citations appear as "[RA __]".]

ceased operations, went out of business, or failed to become signatory to successor agreements.

Id. at 1173 (emphasis supplied). See also District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan & Trust, 826 F.2d 280, 282 (4th Cir. 1987), cert. denied, 485 U.S. 935 (1988) ("we agree with the district court's conclusion that the intention of the parties in providing for retirement health benefits was to guarantee their provision for life."); In Re Chateaugay Corp., 945 F.2d 1205, 1210 (2d Cir. 1991), cert. denied, ___U.S. ___, 112 S. Ct. 1167 (1992) ("the retired employees are guaranteed the provision of health benefits for life under the collective bargaining agreement"); Barrick Gold, 823 F. Supp. at 1402; LTV, 163 B.R. 960.

40. The Combined Fund neither admits nor denies the allegations set forth in paragraph 40 of Plaintiff's Statement and instead relies upon the terms of the document cited therein to speak for themselves.

41. The Combined Fund neither admits nor denies the allegations set forth in paragraph 41 of Plaintiff's Statement and instead relies upon the terms of the documents cited therein to speak for themselves.

42. The Combined Fund denies the allegations set forth in the first sentence of paragraph 42 of Plaintiff's Statement. See Response to Paragraph 39, above. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 42 and instead relies on the documents cited therein to speak for themselves.

43. The Combined Fund neither admits nor denies the allegations set forth in paragraph 43 of Plaintiff's Statement and instead relies upon the terms of the documents cited therein to speak for themselves.

44. The Combined Fund neither admits nor denies the allegations set forth in paragraph 44 of Plaintiff's Statement and

instead relies upon the documents cited therein to speak for themselves.

45. The Combined Fund neither admits nor denies the allegations set forth in paragraph 45 of Plaintiff's Statement and instead relies upon the documents cited therein to speak for themselves.

46-55. The Combined Fund neither admits nor denies the allegations set forth in paragraphs 46 through 55 of Plaintiff's Statement and instead relies upon the documents cited therein to speak for themselves. The Combined Fund notes, however, that as the court stated in Templeton v. Shalala, No. TH 93-158-C-TH (S.D. Ind. April 4, 1995), the "1950 UMWA Welfare and Retirement Fund . . . provided a comprehensive health benefits package covering unlimited hospitalization, out-patient treatment and rehabilitation expenses." Slip. Op. at 34. The court further noted that those coverage provisions "do not differ markedly from the benefits currently provided to Combined Fund beneficiaries." Id.

56. The Combined Fund denies the allegations set forth in paragraph 56 of Plaintiff's Statement. See Responses to paragraphs 39 and 46-55, above.

57. The Combined Fund admits that the UMWA and BCOA entered into a new NBCWA in 1974. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 57 of Plaintiff's Statement and instead relies upon the terms of the 1974 NBCWA to speak for themselves.

58. The Combined Fund neither admits nor denies the allegations set forth in the first, second, fourth, and fifth sentences of paragraph 58 of Plaintiff's Statement and instead relies upon the terms of the 1974 NBCWA to speak for themselves. Although the Combined Fund admits that EACC was a signatory to the 1974 NBCWA, the allegation concerning Plaintiff's status as a signatory to the NPCWA is a legal conclusion to which no response is required.

59. The Combined Fund denies that financial mismanagement of the 1950 W&R Fund led to a crisis in the UMWA multiemployer health care system. The Combined Fund admits that a combination of demographic and economic factors adversely affected the financial stability of that system in the 1970s. The Combined Fund is without sufficient knowledge to admit or deny the allegation that these were the only factors that prompted the UMWA and BCOA to restructure the system in 1978.

60. The Combined Fund denies the allegations set forth in the first sentence of paragraph 60 of Plaintiff's Statement. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 60 and instead relies upon the court decisions cited therein to speak for themselves.

61. The Combined Fund admits that the UMWA and BCOA entered into a new NBCWA in 1978. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 61 of Plaintiff's Statement and instead relies upon the terms of the 1978 NBCWA to speak for themselves.

62. The Combined Fund neither admits nor denies the allegations set forth in paragraph 62 of Plaintiff's Statement and instead relies upon the documents cited therein to speak for themselves.

63. The Combined Fund neither admits nor denies the allegations set forth in paragraph 63 of Plaintiff's Statement and instead relies upon the terms of the 1978 NBCWA to speak for themselves.

64. The Combined Fund admits that the continued provision of health care benefits to retired miners and their dependents through the UMWA multiemployer health care system for retired miners was severely jeopardized in the 1980s. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 64 of Plaintiff's Statement and instead relies upon the court decisions cited therein to speak for themselves.

65. The Combined Fund admits the allegations set forth in paragraph 65 of Plaintiff's Statement.

66. The Combined Fund admits that the UMWA and BCOA entered into a new NBCWA in 1988. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 66 of Plaintiff's Statement and instead relies upon the documents cited therein to speak for themselves.

67. The Combined Fund admits that the funding crisis in the UMWA multiemployer health care system for retired miners and their dependents continued into the 1990s. The Combined Fund denies that the benefits provided to retired miners and their dependents were "first mandated" in the 1974 and 1978 NBCWAs. See Response to paragraph 39, above. The Combined Fund admits that the funding of retiree health care benefits was an issue in a labor dispute between the Pittston Coal Group of companies and the UMWA.

68. The Combined Fund admits that Secretary of Labor Elizabeth Dole created the Coal Commission. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 68 of Plaintiff's Statement and instead relies upon the terms of the Coal Commission Report and the comments of the individual members of the Coal Commission to speak for themselves.

69. The Combined Fund admits that the Coal Commission recommended two statutory approaches to solve the crisis that was threatening the continued existence of the UMWA multi-employer health care system for retired miners and their dependents. Under the first approach, the Commission called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees; and (2) a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. Coal

Commission Report, pp. 61-64. The second approach called for the creation of a single, private multiemployer plan to provide health benefits to orphan retirees. To produce the revenue that the first approach would have generated through an industry-wide tax, the second approach contained a financing scheme that imposed liability not just upon employers that signed the 1978 or a later NBCWA, but upon all employers and their related business entities that were, at one time, signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, this plan seeks additional revenues from a broadened base of current and past signatories to the contracts, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

Id. at 65 (emphasis supplied); see also id. at 67.

70. The Combined Fund admits that after the Coal Commission issued its report and recommendations, Congress conducted its own examination of the crisis that was threatening the UMWA multiemployer health care system for retired miners and their dependents. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 70 of Plaintiff's Statement and instead relies upon the legislative history of the Coal Act to speak for itself.

71. The Combined Fund admits that the Coal Act was passed by Congress as part of the Comprehensive Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776. The Combined Fund neither admits nor denies the remaining allegations set forth in paragraph 71 of Plaintiff's Statement and instead relies upon the provisions of the Coal Act to speak for themselves.

72. The Combined Fund neither admits nor denies the allegations set forth in paragraph 72 of Plaintiff's Statement and instead relies upon the legislative history of the Coal Act to

speak for itself. The Combined Fund denies Plaintiff's assertion that Congress enacted the Coal Act under a quote "mistaken assumption. "The Combined Fund notes that, as the Coal Commission and several federal courts have found, signatories to each NBCWA since 1946 have fostered UMWA retirees' and their dependents' legitimate expectations of lifetime health benefits. See Response to paragraph 39, above.

73-77. The Combined Fund neither admits nor denies the allegations set forth in paragraphs 73 through 77 of Plaintiff's Statement and instead relies upon the provisions of the Coal Act to speak for themselves.

78. The Combined Fund neither admits nor denies the allegations set forth in paragraph 78 of Plaintiff's Statement and instead relies upon the provisions set forth in the federal budget to speak for themselves.

79. The Combined Fund denies the allegations set forth in paragraph 79 of Plaintiff's Statement, except that the Combined Fund admits that EACC was a signatory to the 1974, 1978, and 1988 NBCWAs. See Response to paragraph 39.

80. The Combined Fund neither admits nor denies the allegations set forth in paragraph 80 of Plaintiff's Statement and instead relies upon the documents cited therein to speak for themselves.

81. The allegations set forth in paragraph 81 of Plaintiff's Statement concerning EACC's status as the "successor" of Plaintiff are legal conclusions to which no response is required. On information and belief, the Combined Fund admits that by 1966, Plaintiff had already contributed more than $50 million to the 1950 W&R Fund.

82. The Combined Fund admits that Plaintiff, through its wholly-owned subsidiary, EACC, continued to derive profits from its bituminous coal mining operations after 1966. The Combined Fund also admits that Plaintiff, through EACC,

continued to make contributions to the 1950 W&R Fund after 1966.

83. The Combined Fund neither admits nor denies the allegations set forth in paragraph 83 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

84. The Combined Fund neither admits nor denies the allegations set forth in paragraph 84 of Plaintiff's Statement and instead relies on the document cited therein to speak for itself.

85. The Combined Fund neither admits nor denies the allegations set forth in paragraph 85 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

86-97. The Combined Fund neither admits nor denies the allegations set forth in paragraphs 86 through 97 of Plaintiff's Statement and instead relies on the documents cited therein to speak for themselves.

Respectfully submitted,

/s/ Edward M. Gleason, Jr.
John R. Mooney
Beins, Axelrod, Osborne,
Mooney & Green, P.C.
The Colorado Building
1341 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 783-0010

/s/ Peter Buscemi
Morgan, Lewis & Bockius
1800 M Street, N.W.
10th Floor, North
Washington, D.C. 20036
(202) 467-7190

Robert A. Murphy
BBO #363700
Casner, Edwards &
Roseman
One Federal Street
Boston, MA 02110
(617) 426-0135

David W. Allen
Office of the General
Counsel
UMWA Health and
Retirement Funds
4455 Connecticut
Avenue, N.W.
Washington, D.C. 20008
(208) 895-3737

April 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

STATEMENT OF MATERIAL FACTS IN DISPUTE WHICH PRECLUDE THE ALLOWANCE OF THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THE RETIREE CHALLENGED BY EASTERN DID NOT WORK FOR EACC

1. In this action, Eastern Enterprises ("Eastern") challenges the assignment of Mr. Samuel E. East and his wife, Josephine East, two of the beneficiaries assigned to Eastern pursuant to the Coal Act, 26 U.S.C. §§9701-9722. See correspondence from the Social Security Administration dated January 30, 1995, to counsel for Eastern Enterprises, a copy of which was attached at tab 8 to Volume I of Eastern's exhibits in support of its motion for summary judgment [RA 602-03]. It appears that all of the beneficiaries assigned to Eastern are or relate to mine workers who retired before January 1, 1966, which according to Eastern is the date EACC gained its independence from Eastern. See the list of 767 beneficiaries assigned to Eastern, which was submitted by the plaintiff in connection with its request for an injunction and the affidavit of Ronald E. Osborn ("Osborn affidavit") at ¶7 [RA 2120].[1]

2. Samuel Eugene East was hired by Eastern, (then known as Eastern Gas & Fuel Associates), on January 2, 1934. He was discharged by Eastern after 26 years of service, as a hand loader and cutting machine operator, on September 28, 1960, at least

[1] The affidavits of Ronald E. Osborn, Thomas R. Gallagher, Kyu Lee, and Robert H. Quenon are attached to this Statement at tabs 1-4, respectively. [**Petitioner's Note**: supplementary citations have been added to this Statement of Facts to allow the Court to cross-reference the materials to the Record Appendix prepared for the First Circuit. Such citations appear as "[RA __]".]

three years before Eastern Associated Coal Corp. ("EACC") came into existence. See the affidavit of Thomas R. Gallagher ("Gallagher affidavit"), submitted with this opposition, at ¶14 [RA 2173].

Most of Mr. East's employment with Eastern was at a mine known as Stotesbury No. 11 which was in operation from 1941 through September 1967, at which point it was closed. Gallagher affidavit at ¶¶4 & 14 [RA 2171, 2173].

4. Subsequently, Mr. East worked for the CC&L Coal Company from July 20, 1962 to March 15, 1963. On or about March 15, 1963 CC&L Coal Company changed its name to the Calvert Coal Company. Although the company changed its name, Mr. East continued to work for the company until January 9, 1967. CC&L Coal Company/Calvert Coal Company was a NBCWA signatory employer during the period May 1, 1959 through December 5, 1977, at which time it went out of business. See the affidavit of Kyu Lee ("Lee affidavit") at ¶6 [RA 2308].

5. Mr. East was never employed by EACC. Gallagher affidavit at ¶14 [RA 2173].

6. Shortly after leaving employment with the Calvert Coal Company, Mr. East retired and applied for benefits from the UMWA Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). Lee affidavit at ¶7 [RA 2308].

7. Mr. East was a beneficiary of the UMWA Welfare and Retirement Funds of 1946 and 1947, and the 1950 W&R Fund from those plans' inception, and received health benefits from them while he was working for Eastern, the CC&L Coal Company and the Calvert Coal Company. After his retirement in 1967, he continued to be a beneficiary of the 1950 W&R Fund's successor, the 1950 Benefit Plan. Lee affidavit at ¶8 [RA 2308].

8. Mr. East's spouse was a beneficiary of the 1950 Benefit Plan on July 20, 1992 and thereafter became a beneficiary of the Combined Fund. Lee affidavit at ¶9 [RA 2308].

EACC HAS BEEN ASSIGNED ITS OWN RETIREES UNDER THE COAL ACT

9. Pursuant to the Coal Act, EACC itself has been assigned its own retirees and their dependents. The Social Security Administration, as of October 1, 1994, assigned 1,860 beneficiaries to EACC.[2] Between October 1, 1994, and September 30, 1995, EACC will have paid premiums to the Combined Benefit Fund pursuant to the Coal Act of more than $4,000,000.00. Osborn affidavit at ¶3-5 [RA 2119].

10. Among the beneficiaries assigned to EACC under the clear language of the Coal Act are people who may have worked for Eastern, or other coal companies, then subsequently worked for EACC, which was their last employer before they retired. Osborn affidavit at ¶6 [RA 2119].

EASTERN EXERCISED SIGNIFICANT CONTROL OVER EACC EVEN AFTER 1966

11. Eastern was a signatory to coal wage agreements from at least 1942. See tab 6, exhibit "B" in Volume I of Eastern's exhibits [RA 593].

12. Under various coal wage agreements, including the 1950 NBCWA, Eastern was required to pay a certain amount of money per each ton of coal produced into the United Mine Workers of America Welfare and Retirement Fund of 1950 ("Fund"). The per ton contribution increased over the years through various amendments to the 1950 NBCWA.

13. Between 1942 and 1965, Eastern closed at least 20 out of approximately 63 mines. Gallagher affidavit at ¶4 [RA 2171].

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[2] Some of those assignments have been challenged by EACC. Osborne affidavit at ¶3 [RA 2119].

14. Eastern created EACC as a wholly owned subsidiary beginning in 1963. Gallagher affidavit at ¶3 [RA 2171].

15. From 1963 through 1965, Eastern transferred certain assets of its coal division to EACC in exchange for 100% of EACC's stock.[3] A legal opinion dated November 7, 1962, drafted by Eastern's then general counsel, Eli Goldston, characterizes the anticipated creation of what ultimately would be called EACC as a transfer of coal division assets. Gallagher affidavit at ¶5 [RA 2171].

EACC DID NOT ASSUME ANY OF EASTERN'S COAL ACT OBLIGATIONS

16. After it created EACC as a wholly owned subsidiary, Eastern retained substantial control over EACC's operations and profits. See Gallagher affidavit at ¶¶7-12 [RA 2172-73]. Evidence of Eastern's control over EACC includes:

(a) Eastern continued to reap 100% of the profits of the coal mining operations through dividends from EACC. In 1986 alone, Eastern received a dividend from EACC of $24,162,854. Gallagher affidavit at ¶¶8 & 9 [RA 2172].

a. EACC's board continued Eastern's practice of voting monthly allowances to coal division employees who had retired prior to the creation of Eastern's pension plan; but, Eastern, through a Retirement Committee, directed EACC to vote for the monthly allowances as determined by Eastern. Gallagher affidavit at ¶10 [RA 2172].

b. Even Camp Lightfoot remained within the sphere of Eastern's influence after the creation of EACC. When the camp's only full-time employee, Kenneth Brookman, sought pension benefits in 1984, the issue was presented to Jim Mettling, an Eastern employee for

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[3] On or about May 13, 1980, Eastern created Coal Properties Corp. ("CPC") as its wholly owned subsidiary. On May 26, 1980, CPC became the owner of 100% of EACC's stock. Gallagher affidavit at ¶3 [RA 2171].

final determination. See Gallagher affidavit at ¶11 [RA 2172-73].

17. The "evidence" upon which Eastern relies in alleging that EACC represented itself as a successor to Eastern, and as having assumed all of Eastern's liabilities, consists of statements made by Eastern itself or by EACC during a time that it was under Eastern's substantial control. See Plaintiff's statement of facts at ¶¶5-8 [RA 117-18].

18. During the period from 1942-1965, Eastern profited as a result, in part, of the labors of its UMWA members, and from 1966-1987, Eastern profited, through payments by EACC of 100% of its net profits to Eastern, as a result, in part, of the labors of UMWA members. Gallagher affidavit at ¶¶8 & 9 [RA 2172].

19. There is no written or other agreement in existence in which EACC agreed to assume from EACC agreed to assume from Eastern: (a) liabilities under laws not enacted at the time of the transfer of assets to EACC; (b) unforeseeable liabilities; (c) liabilities not in existence at the time of the asset transfer to EACC; or (d) any statutorily created liabilities, such as those imposed by the Coal Act, for lifetime health benefits for retirees and their dependents. See Gallagher affidavit at ¶6 [RA 2171-72].

20. The "interim agreement" between Eastern and EACC does not provide for the transfer of all liabilities to EACC, nor does it provide for any indemnification of Eastern by EACC for such liabilities. See the interim agreement, a copy of which was attached at tab 5, exhibit "C" to Volume I of Eastern's summary judgment exhibits [RA 259-61].

PEABODY DID NOT ASSUME ANY OF EASTERN'S COAL ACT LIABILITIES

21. In the Stock Exchange Agreement through which Peabody Holding Co., Inc. ("Peabody") acquired EACC (the "Stock Exchange Agreement"), Peabody did not agree to assume from Eastern: (a) liabilities under laws not enacted at the time of the Stock Exchange Agreement; (b) unforeseeable liabilities; (c) liabilities not in existence at the time of the Stock Exchange Agreement; or (d) any statutorily created liabilities, such as those imposed by the Coal Act, for lifetime health benefits for retirees and their dependents. See the affidavit of Robert H. Quenon ("Quenon affidavit") at ¶4 [RA 2304]; Gallagher affidavit at ¶13 [RA 2173].

22. To the contrary, the Stock Exchange Agreement was explicit in Section 5(c) that, "CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto ...." The class of individuals specified were persons who had "retired or otherwise ceased to be employed by CPC or any of its Subsidiaries" (including EACC). This class of individuals did not include former Eastern retirees who had never worked for CPC or EACC. Schedule 5(c) also makes reference only to a "Benefit Plan for UMWA Represented Employees of EACC and Subs" – not for Eastern employees who had never worked for EACC. Quenon affidavit at ¶5 [RA 2304]; Gallagher affidavit at ¶13 [RA 2173] and exhibit "G" [RA 2206].

23. In fact, in Section 2(k) of the Agreement Eastern represented, warranted and covenanted, in pertinent part:

> "Except as and to the extent [of] ... liabilities and obligations incurred in connection with and specifically contemplated by this Agreement, neither CPC nor any Subsidiary or Affiliate of CPC [including EACC] has incurred any liabilities

or obligations of any nature (whether absolute, accrued, contingent or otherwise) which ... are material to CPC and such Subsidiaries and Affiliates taken as a whole .... "

Quenon affidavit at ¶6 [RA 2304]; Gallagher affidavit at ¶13 [RA 2173] and exhibit "G" [RA 2220].

24. As of July 20, 1992, EACC, Peabody, and Coal Properties Corp. were not under common corporate or management control with Eastern. Gallagher affidavit at ¶15 [RA 2173].

Partial Listing of Miners and Other Beneficiaries Assigned to Eastern by SSA[1]

Miners and other Beneficiaries	SSN	Dates Miners Employed
*[2]Chernushin, Anthony J.	175-18-8207	07/56-06/57
* Smith, Theodore F.	191-10-8654	01/46-03/46
		07/46-12/49
		04/50-06/50
		07/51-09/55
		04/56-06/54
Smith, Hazel M.	199-30-4266	
* Storey, John W.	191-10-8710	01/46-12/47
		07/48-06/51
		01/52-03/52
Storey, Arlene	161-38-5530	
* Tomasky, Mike	193-05-5028	01/46-03/48
Tomasky, Pauline	235-44-4577	
* Koziol, John A.	193-05-5980	07/56-06/59
Koziol, Anna		
* Malek, George	193-07-7210	02/46-07/59
Malek, Pauline	160-20-8279	
* McHenry, Charles W.	193-09-6050	01/57-09/59
		04/60-06/60
McHenry, Martha W.	270-56-5991	
* Keener, Lawrence R.	193-10-7965	7/52-12/52
Keener, Ethel	179-28-4744	

[1] This list was tabulated from two letters from SSA to Eastern, RA 2121-69, that were attached to the Affidavit of Ronald E. Osborn, April 13, 1995, RA 2118-20, which was an exhibit to Third Party Defendants' Statement of Material Facts in Dispute which Preclude the Allowance of the Plaintiff's Motion for Summary Judgment.

[2] Asterisk "*" denotes miners, the other individuals listed are the miners' eligible relatives assigned to Eastern.

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Brumley, Sank S.	211-01-5387	4/57-12/58
		4/58-6/58
		10/59-12/59
		4/60-6/60
		12/60-6/61
Brumley, Lena	160-36-1532	
* Chryczyk, Jacob	211-12-7182	07/47-09/49
		04/50-09/51
		07/52-09/52
* Thompson, James G.	229-07-6180	07/48-06/58
		01/59-09/65
Thompson, Lottie	224-28-4197	
* Rivers, Walter D.	231-12-7473	01/47-09/48
		01/49-12/53
Rivers, Beulah	232-92-7236	
* Ackelson, George E.	233-07-5848	07/54-03/61
Ackelson, Phoebe	481-38-5187	
* Hinte, Chris	233-07-6090	1/46-9/46
		1/47-9/47
		1/48-9/48
		1/49-9/50
		1/51-9/52
Hinte, Bertha	233-96-9536	
* Goley, Charles R.	233-07-8782	7/49-9/52
		1/53-9/53
		1/54-6/58
		10/58-6/59
		10/59-6/62
Goley, Nettie	232-92-7068	
* Anthony, Milton L.	233-07-8951	01/46-06/59
Anthony, Corrine		
* Herron, Arthur	233-10-5054	07/47-06/51
Herron, Juanita	232-42-8663	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Johns, Joseph M.	233-10-6044	10/48-06/53
Johns, Elizabeth M.	362-40-8077	
* Adams, Austin N.	233-14-7217	01/46-03/54
		07/54-09/54
		01/55-07/60
Adams, Leola	236-38-8942	
* Southern, Orville	233-28-8039	1/49-09/51
Southern, Helen	234-24-6326	
* Nutter, Joseph W.	235-09-5901	07/47-12/47
		1/48-9/48
		1/49-9/50
		7/51-9/51
Nutter, Betty	217-22-3039	
* Smith, Clyde W.	235-09-6246	07/56-09/60
Smith, Glee	235-44-5633	
* Humphrey, Howard	235-09-8535	01/46-06/49
		10/49-09/50
		07/51-07/51
Humphrey, Adgie	232-96-7783	
* Novak, John	235-10-6816	1/51-12/53
		7/54-9/56
		1/57-9/57
		1/58-3/58
Novak, Anna	233-08-3538	
* Castle, Curtis	403-10-5944	04/48-06/58
* Tononi, Frederick	167-07-8068	01/57-12/64
Tononi, Helen	170-36-4898	
* Crum, Rosco H.	177-01-8541	04/48-06/48
Crum, Florence C.	199-26-8952	
* Allen, D.	233-22-8844	01/46-10/47
Allen, Hazel		
* Robinson, Byrd	235-05-5343	4/46-12/47

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Jennings, Luther W.	235-07-5414	10/47-6/48
		7/49-9/49
Jennings, Polly	234-38-6652	
* Horn, Edgar	405-07-6332	4/51-12/51
		7/52-9/52
Horn, Gladys	232-34-8567	
* Walkovich, John J.	175-18-7256	1/46-1/62
Walkovich, Josephine	165-22-1508	
* Markalinski, Philip	177-01-8023	10/46-12/46
* Smith, Carl F.	191-05-8331	7/48-6/62
		4/63-6/63
Smith, Gwyenne	165-24-8559	
* Fedpre, Andrew J.	191-07-8760	01/46-06/58
Fedore, Bertha		
* Lasko, Steve	191-10-5187	10/48-06/49
Lasko, Dorothy M.	190-26-0021	
Lasko, Crissey L.	201-60-8680	
Lasko, Beth A.	166-62-4434	
* Earnest, Kenneth D.	191-10-8734	1/46-9/47
		1/49-6/58
Earnest, Helen	194-01-2789	
* Smith, William H.	193-09-6376	7/51-9/51
* Stahl, Charles L.	209-01-5363	01/46-12/58
Stahl, Elsie	161-36-0472	
* Shedlock, Steve G.	209-01-7103	7/46-9/49
		4/50-6/50
		10/51-12/51
* Shook, John J.	209-03-6308	7/56-12/65
Shook, Elizabeth	168-52-3252	
* Simpson, James W.	209-05-5197	1/46-12/50
Simpson, Florence		

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Shaffer, Charles S.	209-09-8266	07/49-09/51
		04/52-06/52
		01/53-06/53
Shaffer, Elda	208-34-2822	
* Soltis, John	209-10-7130	07/46-06/63
Soltis, Helen	162-12-5202	
* Shoff, Lincoln A.	211-01-7713	1/46-12/62
Shoff, Margaret	133-16-2948	
* Long, Charles R.	211-01-7717	1/46-6/58
Long, Nellie M.	170-26-5182	
* McCreary, Mason F.	211-05-7891	01/46-12/46
		04/47-06/47
		04/50-06/52
McCreary, Mary	207-34-1121	
* Cole, Noah	223-10-6993	01/52-06/65
Cole, Della	403-52-2084	
* Smith, James E.	225-05-5333	01/46-06/62
Smith, Beulah	226-32-7430	
* Clark, Clyde	227-07-6474	01/46-06/53
Clark, Inas		
* Conley, Ernest	231-05-7991	07/48-09/48
		01/49-06/65
Conley, Ruth	234-32-5231	
* Harrah, Everett	233-07-5418	7/46-6/54
Harrah, Wilda	275-26-6120	
* Hawley, John F.	233-07-5507	1/46-6/62
Hawley, Macie	232-96-7324	
* Vance, Theron	233-07-7284	1/46-9/47
		1/48-9/48
		1/49-9/51
		1/52-9/52
		1/53-9/53
Vance, Beulah	232-34-5874	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Vitsos, Steve J.	233-07-8852	1/48-6/52
Vitsos, Rebecca	234-62-6909	
* Detamore, Delbert	233-07-8868	1/46-9/50
		7/51-9/51
Detamore, Mabel	236-38-5889	
* Harris, Clarence E.	233-07-8911	1/46-12/61
		4/62-6/62
Harris, Ruth P.	422-32-0522	
* Younger, Albert E.	233-10-5740	1/46-6/47
		04/48-06/48
		01/49-06/56
		10/57-03/58
Younger, Evelyn L.	236-72-7712	
* Mollette, Ali	233-12-5618	1/47-3/47
Mollette, Ada	407-22-6521	
* Nelson, Albert	233-12-6553	12/46-9/48
		1/49-12/53
		7/56-9/57
		1/58-9/61
		1/62-6/62
Nelson, Eunice	232-52-8032	
Logwood, Michael		
* Webb, Lloyd B.	233-12-6871	1/50-6/53
		7/56-12/64
Webb, Genieve	235-46-1462	
* Hughes, Clarsnce C.	233-14-6496	1/52-03/59
Hughes, Angelee	300-24-3139	
* Akers, Wildia	233-14-6506	1/47-9/47
Akers, Stella	234-36-9559	
* Harless, Roy B.	233-14-6786	01/48-6/62
		01/63-6/63
		03/64-09/65
Harless, Doris	235-60-1777	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Lusk, Robert L.	233-14-6801	01/46-06/49
Lusk, Lillian	458-40-2951	
* Terry, Charles L.	233-14-8176	1/46-6/58
Terry, Jessie	236-36-0267	
* McClanahan, Ernest F.	233-16-5427	1/46-9/58
		1/59-9/59
		1/60-6/60
McClanahan, Hazel	221-16-0223	
* Wood, Millard	233-18-5000	01/46-12/48
		07/49-09/49
		01/51-09/69
Wood, Sylvia	232-70-4232	
* Thompson, William E.	233-18-5029	01/46-09/47
		04/48-09/60
Thompson, Ruth	234-56-6786	
* Cook, Kenneth E.	233-18-7036	1/46-9/48
		1/49-9/52
		4/53-6/53
Cook, Eleanor J.	235-05-0899	
* Ratliff, Bud J.	233-26-8857	1/46-12/46
		4/47-3/49
Ratliff, Iris	233-88-6533	
* Halsey, Woodrow	233-28-6701	01/46-03/48
		07/48-12/51
		04/52-09/57
		01/58-03/61
Halsey, Lucy	236-70-6623	
* Chambers, Josh R.	233-28-8139	01/46-06/53
		04/55-06/55
		10/55-12/63
		04/64-06/64
Chambers, Eliza	234-56-6448	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* White, Phillip	233-30-8556	1/46-3/58
		1/65-12/65
* Williams, Clarence	233-34-6212	01/47-06/47
Williams, Alice F.	235-70-5004	
* Vest, Fred C.	233-34-6265	10/48-12/48
		07/49-09/49
Vest, Claralee	235-30-6386	
* Greer, Leroy	233-38-7585	04/49-09/60
Greer, Juanita P.	233-42-0617	
* Moran, Calvin L.	233-38-7753	07/46-09/46
		04/47-06/48
		01/49-03/58
		01/59-06/62
		07/63-09/63
Moran, Margaret E.	234-46-0515	
* Haskett, Clarence L.	235-01-8441	1/48-3/51
		7/51-3/52
		7/54-9/54
Haskett, Helen	233-22-9169	
* Bailey, Guy C.	235-03-7685	1/51-6/53
		7/56-9/62
		4/63-6/63
Bailey, Blanche	233-96-7588	
* Tucker, James	235-03-7795	07/46-03/58
Tucker, Rosa	244-62-3700	
* McCormick, James O.	235-03-7807	01/46-12/46
		04/47-09/50
		04/51-06/51
McCormick, Sadie	232-96-9030	
* Vaughn, Buford	235-05-5307	01/46-03/58

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Leslie, Patrick A.	235-05-5320	01/48-03/48
		10/48-12/48
		07/49-09/49
Leslie, Edith	407-56-9386	
* Crews, F.	235-05-5345	01/46-09/47
* Norris, George E.	235-05-5457	1/46-9/48
		4/49-6/49
		7/50-3/58
Norris, Ruby	233-42-0468	
* Stafford, James I.	235-05-5472	9/48-6/49
Stafford, Zenith	232-52-7774	
* McKinney, Darst	235-05-5572	1/46-3/60
* Watkins, Earl S.	235-05-6158	4/48-6/48
		10/48-03/53
		10/55-12/55
Watkins, Flora M.	235-70-2472	
* Edwards, Lester G.	235-05-6974	07/48-12/52
* Delp, Kyle B.	235-05-7018	1/46-9/49
Delp, Jackie Jr. L.	233-15-4756	
* Fralin, Alex	235-05-7092	1/46-3/58
Fralin, Myrtle	233-64-9788	
* Kilbourne, Dempsey B.	235-05-7385	1/46-3/65
		7/65-9/65
Kilbourne, Florence	233-40-6599	
* Cumby, Clarence	235-05-7419	1/46-3/46
		1/47-3/47
* Philpott, Clair D.	235-05-8785	07/48-12/48
Philpott, Margaret L.	235-42-8066	
* Dolin, Wilburn	235-07-5053	4/46-6/47
		7/48-12/48
		4/49-6/49

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Dillard, Theodore R.	235-07-5063	1/46-9/57
		1/58-6/60
Dillard, Marion	235-86-2447	
Roberson, Yolanda L.	235-11-7255	
Roberson, Corey A.	236-23-8726	
* Wydo, Nick M.	235-07-5266	04/49-6/53
Wydo, Irene	233-50-1388	
* Coffey, Guy G.	235-07-5363	01/47-12/52
		04/53-06/53
Coffey, Lula	137-44-0103	
* Siskey, Ziggie	235-09-5248	07/46-09/46
		01/47-06/47
		01/48-03/48
		10/8-06/49
Siskey, Virginia	233-40-5633	
* Wade, Leonard E.	235-09-5410	7/47-9/48
		1/52-12/53
		4/54-12/54
		4/55-12/59
		7/60-3/62
Wade, Mary E.	233-36-9186	
* West, Cecil	235-09-5425	7/47-6/60
		6/61-6/62
West, Tressie	232-48-5976	
* Eubanks, Otho	235-09-6299	1/46-12/52
Eubanks, Grace A.	181-20-3509	
* Redden, Lovell M.	235-09-6343	10/47-12/47
Redden, Rema	233-38-3343	
Redden, Johnie D.		
* Lewis, Odell C.	235-09-6370	01/46-06/46
Lewis, Lana	233-38-8973	
* Avancini, Bill W.	235-09-6389	10/55-06/59
Avancini, Silvia	236-40-1626	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Bogle, James W.	235-09-7013	1/46-6/55
		7/56-9/56
* Woods, George	235-09-7253	7/47-6/51
Woods, Irma	281-22-4465	
* Hess, Ernest W.	235-09-7292	1/46-12/49
		4/50-12/52
Hess, Sylvia	236-54-3977	
* Huddleston, Charles M.	235-09-7420	1/46-9/47
		1/48-9/48
		1/49-9/49
		1/50-9/50
		1/51-9/51
Huddleston, Lucille	236-70-2539	
* Canterburry, Edward I.	235-09-7469	01/46-09/46
		01/47-09/47
		01/48-09/48
		01/49-06/60
Canterbury, Josie	233-54-7815	
* Martin, Melvin O.	235-09-7514	01/46-3/53
Martin, Carrie	235-56-7646	
* Perkins, Modia I.	235-09-7516	1/46-3/53
Perkins, Hazel V.	233-44-2358	
* Wilkerson, Steven	235-09-7525	7/48-3/53
Wilkerson, Esther	236-86-6266	
* Prather, Lewis	235-09-8462	01/46-09/50
		07/51-09/51
Prather, Nettie	232-90-8446	
* Roop, Carl E.	235-09-8541	7/46-9/46
		7/47-9/47
		1/48-6/54
Roop, Olive	233-96-8138	
* East, Samuel E.	235-10-5990	01/46-09/60
East, Josephine	352-18-1268	
* Boyd, Vernie A.	235-10-6263	07/49-09/60

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Johnson, Telford	235-10-6293	1/46-3/58
Johnson, Rosa	232-66-0383	
Johnson, Latosha T.	302-80-6051	
* Short, Avery M.	235-10-6671	10/47-09/50
		01/51-03/53
Short, Helen	267-64-2249	
* Bolling, Ernest L.	235-10-7538	04/47-06/53
		01/56-06/58
		10/58-12/62
Bolling, Mattie	291-26-0896	
Bolling, Alicia M.	235-02-4183	
* Holstein, Burley B.	235-10-7589	1/46-3/46
		1/51-6/55
		10/55-12/55
		7/56-9/56
Holstein, Lillian M.	233-64-9628	
* Humphrey, William R.	235-10-7713	1/46-6/47
Humphrey, Elizabeth C.	233-98-4238	
* Parsons, Earl	235-10-8110	1/46-6/55
		4/56-6/56
Parsons, Stollie	235-84-2819	
* Booth, Paul E.	235-10-8182	04/48-06/48
		01/55-06/58
* Matheny, Robert L.	235-10-8796	07/48-06/50
		10/50-06/53
Matheny, Martha	236-30-0084	
* Brooks, Robert L.	235-16-6447	01/47-03/47
Brooks, Annie	232-68-1238	
* Moore, Russell J.	235-16-7201	01/46-12/52
		10/53-03/60
Moore, Delphia	236-74-4918	
* Woodrum, Raymond L.	235-18-6033	01/46-09/50
Woodrum, Mary	236-66-6387	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Snyder, Lester L.	235-18-6494	1/46-6/49
		10/51-12/51
* Jones, Edd C.	235-18-6525	10/50-12/50
		07/51-09/51
Jones, Viola	235-68-1515	
* Kirby, Charles	235-22-8686	7/46-9/46
		7/51-9/51
		1/52-12/52
Kirby, Elsie	303-46-2896	
Kirby, Jennifer L.	232-31-1521	
* Stone, James M.	235-26-5159	01/46-06/58
Stone, Edna		
* Snuffer, Thomas L.	235-28-5682	01/46-03/46
		01/47-03/47
		07/47-06/53
		01/56-09/61
		04/62-06/62
Snuffer, Clara	234-46-0163	
* Gibson, Clifford H.	235-28-6858	01/51-09/53
		04/54-06/54
* Nelson, Eli Z.	235-28-7958	01/46-03/46
		01/47-03/47
Nelson, Joda	232-38-4088	
* Mitchell, Robert	235-30-6969	09/46-12/46
Mitchell, Barbara	235-86-9053	
Belcher, Robert		
Belcher, Bernard		
Belcher, David		
* Milan, John D.	235-30-7049	1/46-9/48
Milan, Beulah	235-44-2397	
* Cook, Howard	235-30-8708	1/46-12/52
		7/53-9/53
Cook, Lola	233-58-7488	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Johnson, Claude	235-34-7750	1/46-9/47
		1/48-9/48
		1/49-12/49
		4/50-9/53
		1/54-9/57
		1/58-12/58
		4/59-6/59
Johnson, Mary	235-38-1390	
* Colisino, Patsy	234-38-6098	01/48-9/49
		04/50-6/50
Colisino, Erma M.	234-54-4957	
* Brown, Willard	235-38-8190	07/46-09/46
		01/47-12/63
Brown, Zelma		
* Sturgill, John W.	235-38-8300	01/46-03/46
		07/47-12/65
Sturgill, Pauline	235-58-7632	
* Moreau, Joe H.	235-44-7619	10/48-12/48
Moreau, Anna	236-52-1187	
* Ashwood, Stanley B.	285-09-5175	01/46-12/57
		04/58-06/58
Ashwood, Ruth B.	287-22-1069	
* Sword, Spencer M.	403-01-6023	03/46-06/52
		12/52-09/53
Sword, Jesse	407-52-5975	
* Vicars, Oscar L.	403-01-6051	01/46-06/53
Vicars, Celia	404-76-2955	
* Hager, Joe	403-01-6056	04/46-06/52
		01/53-06/53
Hager, Essie	404-48-9482	
* Johnson, Jeff L.	403-01-6066	01/46-06/53
Johnson, Rissie	403-12-8853	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Little, Oscar	403-01-6073	1/46-9/46
		4/47-3/51
		10/51-6/52
Little, Bernice M.	401-40-7661	
* Harmon, Eugene H.	403-01-6315	01/46-06/53
Harmon, Oneida	404-32-0392	
* Damron, Wayne	403-01-6585	1/46-6/53
Damron, Chloie	402-88-5645	
* Gooden, Harold	403-01-6596	1/46-9/48
		1/49-6/53
Gooden, Myrtle	401-15-3180	
* Smith, Milford W.	403-01-8114	01/46-12/49
		07/50-09/50
* Phillips, John A.	402-05-5971	04/47-06/55
		07/56-09/56
		01/57-03/57
Phillips, Reba		
* Miller, John	403-05-7219	1/46-3/53
Miller, Stella		
* Tackett, Lonnie	403-09-5557	04/47-09/47
* Gooslin, Jesse	403-10-5607	01/57-09/57
Gooslin, Goldie		
* Blair, Sherman	403-16-6656	10/49-6/51
		10/51-6/53
		7/56-6/61
		4/62-6/62
Blair, Mary	402-52-8220	
* Jude, Luster	403-20-8239	01/47-03/47
		07/47-12/47
Jude, Mae		
Jude, Lisa		
* Hopkins, William	405-05-7922	07/48-06/49
		07/50-09/51
Hopkins, Dona	403-54-1374	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Rice, James	405-18-8988	08/51-09/51
		04/52-04/54
Rice, Francoise	524-68-1577	
* Scarberry, Estill	407-18-8062	07/52-06/59
Scarberry, Ethel	406-36-6425	
* Mullins, Junior	407-18-8525	1/46-9/53
Mullins, Tanie L.	402-98-7811	
* Isaac, William L.	407-28-7473	1/49-3/49
		10/49-6/51
		10/52-12/52
Isaac, Rosie		
* Caudill, Powers	407-38-8970	7/58-6/60
		10/60-12/62
Caudill, Elma		
* McCoy, Arthur D.	415-03-8167	1/49-3/49
		4/50-6/54
		10/54-12/54
* Welsh, James	235-03-8229	1/52-6/53
		7/54-9/54
* Jessup, Charles M.	235-05-5413	1/46-3/46
		7/46-6/53
		4/56-6/60
Jessup, Pauline	233-58-4595	
* Johnson, Buddy	235-09-8536	01/46-06/50
		01/51-06/52
		10/53-06/54
* Wilders, George R.	191-18-9238	6/46-12/65
Wilders, Dolores E.	164-28-8286	
* May, Russell	211-01-9406	01/46-05/46
		08/46-11/46
		02/47-05/47
		05/48-06/48
		10/48-08/50

Miners and other Beneficiaries	SSN	Dates Miners Employed
* McConnell, Ira W.	227-03-1093	3/48-9/56
		3/57-9/57
McConnell, Opal	235-46-1088	
* Pannell, Walker R.	227-05-2472	12/46-9/47
		3/48-9/48
Pannell, Rena	243-32-9845	
* Hobson, Edgar	229-07-4108	6/46-9/47
		6/48-3/49
		9/49-12/49
		9/50-3/51
		9/51-3/52
		9/52-12/52
Hobson, Hazel	234-38-6674	
* Armes, James	229-09-1229	3/56-6/65
Armes, Retha	223-46-3324	
* Hylton, Enoch H.	233-07-3401	3/46-9/47
		3/48-3/49
		9/49-9/57
		6/58
* Board, Anthony J.	233-09-9146	9/50-6/56
		12/56
		3/60
Board, Dollie	236-30-7356	
* Breckenridge, Earl H.	233-14-0069	6/46-6/52
		9/56-12/65
Breckenridge, Evelyn	236-48-8281	
* Hensley, Charles	233-14-3271	12/47-6/58
		12/58-6/62
Hensley, McClessie	233-32-1490	
* Pannell, Alexander	233-14-9709	3/46-6/62
Pannell, Margaret		

Miners and other Beneficiaries	SSN	Dates Miners Employed
* McGraw, Willard A.	235-01-2746	9/46-12/46 9/47 6/51-9/60
McGraw, Virginia		
* Richardson, Wilton L.	235-05-1043	3/46-9/54
Richardson, Clara M.	233-70-9385	
* Bolden, John C.	235-05-1151	12/56-9/65
Bolen, Frances	236-18-0458	
* Scott, Russell S.	235-05-4878	3/46-3/58
Scott, Mary	232-16-6738	
* Brown, Curtis F.	235-09-2332	3/46-12/51
Brown, Margaret	232-66-4481	
* Milam, Lacy A.	235-09-4719	01/46-09/56 01/57-09/57 11/58-02/59 05/59-06/59
Milam, Margie	233-64-9794	
* King, Walter R.	235-09-9189	3/46-9/52
* Lafferty, Goodal A.	235-09-9291	6/51-6/52
Lafferty, Nancy	236-48-5327	
* Edwards, Lloyd B.	235-10-2167	3/46-3/58
Edwards, Margaret	233-06-1150	
* Kennedy, James	235-10-2458	6/46-9/47 6/48 3/56-3/58
Kennedy, Virginia V.		
* Barber, M.	235-10-9009	3/49-12/50 3/51-6/51
Barber, Mabel	232-48-0908	
* Kiblinger, Charles W.	235-28-0798	9/47-3/51 9/51
Kiblinger, Evelyn	284-34-5215	
* Lambert, Harold	235-52-0808	6/57-9/65
Lambert, Rosie Lee	236-82-5365	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Kazee, Delbert	401-24-3389	3/51-6/65
Kazee, Mae	404-70-8109	
* Adams, Thurman	403-01-0527	6/48-6/52
Adams, Ollie	403-54-1541	
* Hoskins, Morris	403-01-2885	01/52-05/58 11/59-02/61
Hoskins, Elsie	407-30-0329	
* Hall, Troy	403-01-3147	3/47-9/52 6/53
Hall, Maggie	407-46-0478	
* Williams, Clyde E.	403-07-2116	3/46-12/61
Williams, Bertha		
* Scarborough, Fred R.	403-07-9216	3/48-12/50
Scarborough, Laura	407-22-4232	
* Stines, George D.	403-09-2107	3/53-12/63
Stines, Pauline		
* Mullins, Milton	403-10-9394	3/46-6/53
Mullins, Norma		
* Evans, William T.	403-18-3212	6/50-6/52
Evans, Sallie		
* Gambrell, Clarence	403-26-3578	11/48-08/62 10/62-12/65
Gambrell, Ethel	234-58-8879	
* Spears, Johnny	405-22-0103	12/46-6/49 3/50-9/50 3/51 6/52-9/52 3/53-6/53
Spears, Loretta	400-94-0610	
Spears, Betty	404-90-0902	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Chastain, Marshal	423-18-9048	3/46 6/48-12/50 12/51-6/53 6/56-12/62 9/63
Chastain, Lee W.		
* Leri, Louis	193-10-1290	11/46-12/46
Leri, Anna	162-50-7060	
* Hager, T.	233-07-4546	01/49-02/49
Hager, Reable		
* Harper, James A.	233-12-4218	6/47
Harper, Flora	403-16-9633	
* Pennington, James F.	233-22-4254	6/47
Pennington, Lydia	236-48-8983	
* Lovell, James C.	235-01-2985	3/47
Lovell, Grace	180-50-1312	
* Thompson, George E.	235-05-2525	01/51-12/51
Thompson, Minnie	235-96-2786	
* Gaskill, Charles	235-12-0762	3/46-6/53
Gaskill, Bertha	235-76-3095	
* Maynard, Cecil	403-05-4446	12/48-12/48 3/49-3/49 9/49-9/49
Maynard, Mae	236-66-0872	
* Bunk, Joseph J.	159-12-1030	3/46-6/63
Bunk, Helen	163-30-2701	
* Krisko, Stanley	159-16-2401	3/46-6/60 12/60-12/62
Krisko, Marie	196-22-9878	
* Zock, Lloyd T.	159-16-2471	3/46 3/47 3/49-9/56
Zock, Mary A.	063-12-1873	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Ciotti, Joseph	169-07-2234	9/56 3/57-6/57 9/58
Ciotti, Nancy	163-40-0212	
* Martin, James H.	171-18-2481	6/47-6/54 12/54-9/56 3/57-9/57 3/58-12/59
Martin, Nanna	722-16-1538	
* Earley, Harvey L.	177-01-9319	6/46-12/47 6/48
Earley, Evelyn	203-16-9842	
* Porter, Bruce E.	177-01-9828	3/46-12/48
Porter, Clara	200-50-7548	
* Mattias, Steve	187-01-0338	05/46-08/46 11/46-05/47 08/47-11/47 02/48-05/48 08/48-02/55 04/55-05/58
Mattias, Kathryn V.	383-18-9916	
* Stopka, Frank	191-01-3202	3/46-12/49 6/50
* Vespa, Henry	191-03-3764	3/46-6/49 6/50
Vespa, Stella	176-50-3701	
* Elchin, Mike	191-07-3301	3/51-12/52
* Mihalko, Joseph	191-09-0240	3/46-12/50 6/51
Mihalko, Nellie	170-18-3880	
* Doyka, Walter E.	193-10-3947	3/46-9/46
Doyka, Clara E.	182-50-9372	
Doyka, Thomas E.	183-50-1718	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Orehowsky, Michael F.	193-10-3965	3/46-9/46 3/47-6/58
Orehowsky, Anna	196-22-6550	
* Shedlock, Mike	193-10-4083	3/46-9/49 9/50 12/51
* Seabolt, Merrill W.	193-10-4094	3/49-12/49 6/50
Seabolt, Rosalie	125-12-9939	
* Janosik, John	193-10-4233	3/46-12/49 6/50-6/52
Janosik, Mary	385-42-7160	
* Lutz, John	193-10-4236	3/46-12/62
Lutz, Elizabeth	165-24-7944	
* Bobrowicz, Edward P.	193-10-4240	02/46-05/46 08/46-11/46 02/47-05/47 08/47-11/47 02/48-05/48 08/48-08/49 11/49-12/49 04/50-08/50 11/50-06/55
Bobrowicz, Hedwig	335-14-2629	
* Pristas, George	193-10-4244	3/46-12/62
Pristas, Francis	201-01-4467	
* Yurchik, Joseph W.	193-10-4268	3/46-12/62
Yurchik, Rose	161-50-9822	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Stoltz, Peter F.	193-10-4292	3/46-9/47 3/48-9/48 3/49-9/49 3/50-9/51 3/52-9/52 3/53-9/53 3/54-9/55 3/56-9/56 3/57-12/62
Stoltz, Marguerit	174-14-3069	
* Knisel, William A.	193-10-4318	3/46-9/48 3/49-9/49 6/50-9/55 3/56-9/56 3/57-9/61 3/62-12/62
Knisel, Julia	185-26-3155	
* Podrasky, Joseph G.	193-10-4321	3/46-9/49 M6/50-12/51
Podrasky, Rose A.	162-16-5322	
* Siedlarczyk, Andrew J.	193-10-4329	3/46-9/49 6/50 9/51
Siedlarczyk, Helen	161-38-7363	
* Krisco, Joseph	193-10-4336	3/46-6/52
* Ritchie, Peter	197-10-9110	3/48-12/52
Ritchie, Gay	289-20-4392	
* Kunkle, James	209-01-0695	3/46-6/46 12/46-12/58

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Sabol, Andrew E.	209-01-4295	6/49-12/49 3/50-12/50 3/51-6/51
Sabol, Margaret	286-22-5219	
* Benjack, Andrew C.	209-03-0273	3/46-12/62
Benjack, Agnes	209-07-2722	
* George, Chester H.	209-07-1951	3/46-9/49 9/50-3/51
* Strawderman, Melvin R.	209-07-3869	3/49-3/60
Strawderman, Estella	165-28-9077	
* Blystone, John F.	209-07-9195	3/46-12/48
Blystone, Flora	190-26-8246	
* Hoak, Raymond T.	209-07-9196	3/46-12/48
Hoak, Ella C.	206-52-8757	
* Hazlett, Kenneth L.	209-09-3974	3/46-12/62
Hazlett, Grace	170-36-4497	
* Linton, Samuel	209-10-4295	3/46-12/52
Linton, Idonia	235-36-1985	
* Voss, John G.	211-01-4548	3/46-6/58 9/62-12/62
Voss, Dorothy	175-20-6245	
* Scott, Richard	223-12-4202	12/52-6/59
Scott, Alta	406-68-1635	
Scott, Charlie	407-70-2825	
* Jennings, John W.	225-14-4290	3/46-12/65
* Wade, John T.	227-07-9147	6/47
Wade, Lucille		
* Rife, Thurmond	229-26-0906	3/46-6/46 6/47-12/47 6/48 6/57-9/62 6/63
Rife, Tessie	229-46-6713	
Rife, Melissa D.		

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Collins, Oakley L.	233-07-1372	3/47-9/47 6/48
Collins, Dora	233-88-6853	
* Fink, Kelice A.	233-07-1497	3/47
Fink, Geneve	234-46-0003	
* Beasley, Virgil V.	233-07-1512	9/47
Beasley, Asuncion	236-32-4676	
* Rash, Charles F.	233-07-3416	3/46-6/56 12/56-6/57
Rash, Martha	233-92-6574	
* Lehman, Leroy P.	233-07-3843	3/52
Lehman, Pearl	310-36-4624	
* Price, William H.	233-07-4169	9/46-3/58
Price, Corrine	235-64-5076	
* Workman, Harold F.	233-07-4216	6/50-9/51 6/52-3/54 9/54
Workman, Louise M.	217-22-0783	
* Wilson, Jake	233-09-2417	3/46-6/58 3/59-6/59
* Wood, Eugene	233-09-9133	3/46-12/57 12/58
Wood, May	235-88-6792	
* Pennington, James W.	233-09-9161	9/46
Pennington, Wanda	400-36-3781	
* Acord, Gaylord R.	233-09-9417	3/46-3/58
Acord, Beulah	232-66-2211	
* Oneal, Paul	233-09-9419	12/50-9/60
Oneal, Leta	226-76-3993	
* Green, Hobart	233-09-9758	3/47-12/51
Green, Bertha	235-56-5018	
* Chiericozzi, Sam	233-09-9762	3/46-9/53
Chiericozzi, Victoria	236-26-0417	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Ligocki, Rudolph E.	233-10-2965	12/50-6/53 6/56-9/57 3/58-9/63 3/64-9/64
Ligocki, Jeanette	232-42-9758	
* Mandakunis, Costos N.	233-10-3613	3/46-12/50
* Rose, G.	233-10-3631	9/42-6/42
Rose, Judy	406-14-6598	
* Lambert, John R.	233-10-3851	6/47-12/48 12/50-6/53
Lambert, Ella	236-70-6056	
* Mandakunis, Louis	233-10-4735	3/46-6/61
Mandakunis, Ruth P.	234-38-6578	
* Hudnall, Roy A.	233-10-9551	12/47-6/49 3/52
Hudnall, Martha L.	234-24-8238	
* Jordon, Elbert C.	233-10-9631	3/46-12/52
Jordon, Eva	234-70-6063	
* Bishop, Clyde L.	233-12-1351	12/50-9/52 6/53
* Nelson, Hershel D.	233-12-2014	3/51-12/57
Nelson, Alice	236-96-4194	
* Shaffer, A.	233-12-2038	3/57-9/57
Shaffer, Mary Ann A.	232-68-0116	
* Turner, Sandy L.	233-12-4637	3/46-9/53 9/54
Turner, Mamie	291-34-1543	
* Ferguson, Clyde	233-14-2589	3/47 12/51-9/57 6/58 12/58 3/59-6/59
Ferguson, Louise	233-44-8072	
* Doss, Oscar G.	233-14-2745	3/46-6/49

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Caruthers, Lyton	233-14-3092	3/50-6/62
Caruthers, Venia	236-84-0867	
* Brown, Wayne A.	233-16-3377	3/46-6/48 6/49
Brown, Verna	233-54-9035	
* Duncan, Cecil C.	233-18-4456	6/46-12/46 9/47
* Blackburn, Thelma B.	233-20-0863	3/46-6/52
Blackburn, Thelma	233-34-6488	
* Jarvis, Sherman	233-20-3929	3/46-12/64
Jarvis, Melva M.	235-64-0546	
* Hughes, Walter B.	233-20-9074	3/46-3/58
Hughes, Mary L.	232-96-9277	
* Malagrida, Carl	233-22-4611	3/46-12/47
* Carpenter, Fred	233-26-9407	3/46-12/46 6/47 9/47
Carpenter, Rebecca	233-94-4899	
* Tate, Wilson	233-28-1290	03/46-12/55 09/56 03/57
Tate, Decillian	234-70-9713	
* Cox, Okey R.	233-30-9567	9/57-9/60
Cox, Janet G.	236-48-7751	
Cox, Christophes Lacy, Ashley R.	233-15-5814	
* Richards, Floyd A.	233-30-9672	3/47-9/60
Richards, Mary	233-58-2739	
* Bostick, Robert L.	233-34-4709	3/51-3/60
Bostick, Edith	233-54-9772	
* Church, Fred G.	233-34-9747	6/48-9/62
Church, Ruby	234-42-7713	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Waddell, Billie R.	233-38-9432	9/47-12/53 12/64
Waddell, Freda	232-76-9483	
* Moody, Charles	233-42-0119	6/48-12/48
Moody, Regina	234-46-0713	
* Jarrett, Denver L.	233-44-2199	3/49-9/51
Jarrett, Mildred G.	233-44-3247	
* Bailey, James L.	233-44-9006	9/47-12/47 6/48-9/48 3/58-6/60
Bailey, Gladys	234-86-3003	
* Bailey, Lois D.	233-44-9100	6/53-9/53 9/54 6/55-6/58
Bailey, Lois		
* Duncan, Louise	233-54-9957	12/57-12/65
Duncan, Louise		
* Kinder, Frank H.	235-01-2239	9/47-6/56 12/56
Kinder, Bertha E.	236-96-5756	
* Campbell, Christophec	235-03-9681	3/46-6/51
Campbell, Baby Ruth	230-30-3852	
Campbell, Jacqueline	226-33-2106	
* Elkins, Roy A.	235-05-0168	12/50-6/51
* Larson, Vernon W.	235-05-1268	6/49-3/58
Larson, Ruby	234-96-9257	
* Daniels, Lacy	235-05-1612	6/46-6/51
Daniels, Elva		
* Moore, Roy E.	235-05-2044	6/47-12/52 6/53
Moore, Callie	267-66-7693	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Bailey, Ruby D.	235-05-2095	6/48 9/50-6/51 3/52-9/53 3/54-9/54 3/55-6/58 3/59-9/63
Bailey, Ruby		
* Street, Eugene L.	235-05-3153	3/46-9/46 3/47-9/47 3/48-9/48 3/49-9/50 3/51-9/51 3/52-9/52 3/53-12/53 9/54
Street, Zora M.	232-24-7713	
* Johnson, Samuel L.	235-07-0696	3/46 6/47 9/48-6/52
* Johnson, Charles E.	235-07-0943	3/52-6/52
* Price, Charles E.	235-07-1135	6/48-3/52 9/52
Price, Cecile N.	233-44-7966	
* Washington, French C.	235-07-1189	3/46-12/46 6/47
Washington, Lucille	225-50-5029	
* Broadnax, George W.	235-07-1343	3/49-6/52
Broadnax, Emmaline	232-64-3801	
Broadnax, Tina	233-94-8687	
* Grose, Carlos A.	235-07-1373	3/46-6/52
Grose, Mary K.	293-52-1306	
* Pinion, Sam A.	235-07-2851	3/46-6/52
Pinion, Mary		

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Turner, Simon	235-07-4121	3/47
Turner, Benzie	236-32-4523	
* Legg, Otis B.	235-07-4597	3/46-6/52
Legg, Grace	233-38-1904	
* Widay, Frank V.	235-07-4682	9/57-9/60
Widay, Virginia	233-07-9361	
* Rock, Jacob	235-09-1162	6/51-6/52 3/56-6/57
* Gorta, Joe	235-09-1890	3/46-12/52
Gorta, Rosa	232-02-3886	
* Nutter, Leonard O.	235-09-1921	3/56-6/53
Nutter, Rose	284-32-6784	
* Byrd, Samuel W.	235-09-1925	3/46-9/52
Byrd, Ella L.	236-50-7256	
* Simley, Phillip T.	235-09-1939	3/46-12/52
* Joyce, Ada L.	235-09-1949	3/46-9/52
Joyce, Ada		
* McLemore, Theodore D.	235-09-2077	3/46-12/52
McLemore, Virginia	233-58-7003	
* Harris, King R.	235-09-2160	12/46-6/51
Harris, Iola	211-16-4529	
* Fisher, Ovel O.	235-09-2165	9/52-6/59
Fisher, Loretta	233-20-7659	
* Black, James E.	235-09-2233	9/50-6/52
Black, Ruth J.	236-84-0194	
* Davenport, Isiah	235-09-2262	3/46-12/50 6/51
Davenport, Nannie	278-30-0643	
* Dean, T. R.	235-09-2395	3/46-12/47 9/48-6/49
Dean, Mary	233-38-5644	
* Armstrong, Elmer W.	235-09-2402	3/46-9/52
Armstrong, Carrie	236-42-5230	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Holbrook, Thomas J.	235-09-2520	12/50-6/58
Holbrook, Frances	235-56-9723	
* Dorsey, Harvey A.	235-09-4452	9/47-12/47
Harvey, Ethel		
* Armistead, John L.	235-09-9797	3/46-12/53
Armistead, Josephine	268-64-7833	
* Foster, Luther L.	235-09-9838	12/47
Foster, Gussie M.	451-17-1874	
* Fink, Ernest C.	235-09-9889	3/46-6/48 3/49-6/50 6/52
* Flynn, James E.	235-10-0228	3/46-12/53
* Hairston, Thomas C.	235-10-1579	3/46-9/63 3/64-3/65
Hairston, Dorothy		
* Holland, Turner N.	235-10-1778	3/48-3/53
Holland, Marie	232-42-8714	
* Bright, John H.	235-10-2305	12/50-9/51 9/52
Bright, Rosa K.	235-70-5021	
* Farley, Roy R.	235-10-2397	9/47-12/47
Farley, Ruth	234-56-8015	
* Adkins, Emmitt S.	235-10-2841	3/46-12/46 3/47-3/47 12/48 3/49-3/49 3/50-12/50 3/51-12/51 3/52-12/52
Adkins, Goldie	232-13-7704	
* Wallington, Lawrenc	235-10-2949	3/46-3/53
Wallington, Ruth	232-02-6560	
Wallington, Anthony D.	235-29-2039	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Ziegler, Reece B.	235-10-3320	3/46-9/47
		3/48-6/49
Ziegler, Gretchel	369-24-7030	
* Centers, Theodore R.	235-10-3597	08/47-11/47
		11/48-05/49
* Whittaker, Virgil L.	235-10-3647	05/57-09/58
		01/59-09/60
		01/61-09/61
		01/62-08/62
Whittaker, Ruby E.	232-48-2344	
* Short, George W.	235-10-3677	3/46-12/47
Short, Lorraine	298-26-0858	
Jones, Katrina D.		
* Cooper, Noah L.	235-10-4001	3/46-6/48
Cooper, Gary W.		
* Holstein, Woodrow W.	235-10-4018	12/46-6/51
		12/51-6/53
		6/56-6/58
		12/58-9/59
		6/60-6/60
Holstein, Joetta	233-42-0863	
* Leo, Domenico	235-10-4027	3/46-9/60
Leo, Autie	235-70-5665	
* Moore, Coye E.	235-10-4049	3/46-6/49
		12/49-6/53
* Richards, Lloyd C.	235-10-4073	9/47
		6/48
Richards Josie	167-50-4358	
* Tolley, Walter E.	235-10-4087	3/46-6/53
Tolley, Nina	233-96-6620	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Hughes, Hollie R.	235-10-4166	3/46-9/49
		6/50
		3/51-6/58
		12/58-6/61
		12/61-6/62
Hughes, Alma	236-40-1179	
* Perry, George A.	235-10-4178	6/46-12/48
Perry, Golda O.	235-62-0480	
* Shumate, Bryan	235 10-9040	3/51-12/51
Shumate, Imogene	236-98-2998	
* Cantley, Joe	235-10-9354	9/50-12/50
		6/51
* Barrett, Opal	235-10-9350	3/46-12/59
		3/60-6/60
Barrett, Flora	151-26-2759	
Barrett, Opal	235-96-8771	
* Gorby, John H.	235-12-9237	3/46-6/58
* Thompson, Harry F.	235-16-4596	12/49-9/52
Thompson, Goldie M.	233-22-9119	
* Mullens, Oza	235-16-9591	3/46-6/59
		12/59
		6/60
* Weir, Richard	235-20-9264	3/46-9/63
Weir, Catherine A.	516-24-5623	
* Lester, Bertha	235-26-1189	9/48-6/49
Lester, Bertha		
* Foster, James R.	235-26-9729	9/47-6/48
Foster, Myrtle		
* Fulcher, Howard	235-28-1246	6/52
* Jeffrey, Robert	235-28-1724	01/46-02/53
Jeffrey, Myrtle	235-26-2186	
* Bowman, Raymond L.	235-28-1987	3/46-3/53
Bowman, Margaret	233-40-5877	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Browning, Torkel	235-30-9735	12/46-6/47
Browning, Margaret A.	236-78-1478	
Browning, Samuel S.	236-94-8707	
* Robinson, Herman C.	235-36-9370	9/46-9/64
Robinson, Mildred G.	233-40-5643	
* Whitt, William	235-38-0288	3/47
Whitt, Betty J.	233-60-0156	
* Wimmer, Ralph C.	235-38-1423	6/46-12/56
		9/57
Wimmer, Helen R.	234-40-9841	
* Moran, Herman A.	235-44-0849	9/46-9/56
		3/57-9/57
		3/58
Moran, Virginia	232-34-0327	
* Wilkins, William J.	249-09-0239	3/46-3/53
Wilkins, Mattie		
* Bowling, Clyde R.	283-01-2401	9/47
Bowling, Lyda B.	403-70-7676	
* Curry, Hayward	401-18-2446	3/49
Curry, Lucy		
* Cline, Morgan	401-28-0648	3/47-6/47
Cline, Aline		
* Hall, Lloyd	403-01-3127	3/46-9/46
		3/47-6/53
* Johnson, Ben	403-01-3137	3/46-6/56
Johnson, Della M.	406-90-0717	
* Hall, Silas	403-03-4406	3/46-9/49
		6/50-6/53
Hall, Rilla	400-90-2835	
* Debose, Ulyss	403-03-4426	3/46-6/53
Debose, Freddie	406-48-0892	
* McDavid, George P.	403-05-4218	3/46-6/58
McDavid, Margie	402-92-8646	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Lewallen, Lewis	403-05-4240	3/46-6/48
		3/49-9/50
		6/51
Lewallen, Ruth	405-44-1151	
* Wallen, Melvin	403-07-2544	9/52-6/58
		12/59-9/61
Wallen, Mabel	402-58-5034	
* Tackett, Ellis	403-07-3321	9/52
Tackett, Mellie	400-88-8481	
* Darden, Sam	403-09-2940	3/46-9/47
		3/48-9/48
		3/49-6/53
* Johnson, Elmer C.	403-10-9386	3/46-12/48
Johnson, Frankie	400-74-9243	
* Charles, Glen L.	403-26-4038	12/48-3/61
		3/62-9/63
		3/64-6/64
Charles, Emma J.	235-52-2615	
* Cook, Freeda	405-03-3805	6/52-9/59
Cook, Freeda		
* Vanhoose, Jay	405-05-9281	6/48-6/51
Vanhoose, Rushie	407-92-5282	
* Burke, Hartman	405-22-1524	3/46-9/47
		6/48
		9/51-12/51
		6/52
Burke, Laura		
* Steffey, Charles M.	407-01-1196	12/48
Steffey, Hazel	401-66-8352	
* Stanley, Sam	407-22-1164	3/46-9/47
		3/48-6/48
		12/48-3/49
Stanley, Mary M.	401-34-5868	

Miners and other Beneficiaries	SSN	Dates Miners Employed
* Tiller, Tuness	719-01-4330	08/46-09/46 02/47-05/47 05/51-11/51 05/52-11/52 02/53-05/53
Tiller, Thelma T.	236-60-1608	
* Macidyn, Stanley J.	191-09-0961	12/46-9/48 6/49
Macidyn, Dorothy M.	199-30-5674	
* Birchfield, Noble H.	233-14-1118	3/52-12/52
Birchfield, Virginia	233-68-2371	
* Aldridge, William B.	235-05-1125	9/46-6/53
Aldridge, Gladys	232-86-4153	
* Sweeney, Grady W.	235-05-1825	3/46 3/47 3/51-6/53
Sweeney, Edith	235-68-1323	
* McKinney, Howard J.	235-44-0671	3/48-9/48
McKinney, Elva	232-72-6238	

Eli Goldston

Law Department
November 7, 1962

PROPOSED TRANSFER OF COAL DIVISION ASSETS TO A CORPORATION

II - SALES CONTRACTS AND RELATED MATTERS

The majority of sales are made either on a spot basis or on contracts of one year's duration expiring in most cases in March, at which time new contracts are negotiated. The standard form used for contracts of this type contains no provisions creating any problems of assignment or transfer.

Sales contracts with a term greater than one year are customarily tailor-made and usually do not contain prohibitions against assignment or transfer. The exceptions to this general practice are the following:

A. Eastern is exclusive supplier for the coking coal requirements of Granite City Steel Company under a contract expiring in 1970. In the fulfillment of this contract Granite City and Eastern have entered into supply contracts with Old Ben Corporation, Freeman Coal Mining Corporation, and Sahara Coal Company, Inc., for a portion of said requirements to be obtained from the latter three companies' mines.

   Each of these three supply contracts is coextensive with the Eastern-Granite City contract and poses problems of assignment and transfer by virtue of a provision contained in each as follows:

   > "This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but it may not be assigned by either party

without the written consent of the other, except that any party may without the written consent of the other assign this Agreement to a successor to all or substantially all of its property and assets, and may pledge this Agreement to secure its indebtedness incurred or to be incurred for the purpose of or in connection with the performance of this contract; and any party hereto may without the consent of the others assign to any financing institution or institutions any monies due or to become due hereunder; provided, however, that no such assignment shall operate to release any of the parties hereto from its obligations under this Agreement."

B. A contract with Armco Steel Corporation for the requirements of its Middletown, Ohio plant to be supplied from Eastern's Keystone mine, expiring January 1, 1979, with Armco's option to renew up to 20 more years. The transfer or assignment problem here arises from provisions in said contract reading as follows:

"(a) If Seller shall during the existence of this agreement, or any extension thereof, desire to sell its keystone coal mining properties, leases and facilities, substantially or wholly as a unit, subject to the consent of Seller's lessors, it shall first offer in writing, addressed and delivered to Buyer, for

acceptance within ninety (90) days from date of delivery, thereof, to sell such unit to Buyer, subject to the consent of Seller's lessors, upon the same terms and conditions upon which it may thereafter be offered for sale if not purchased by Buyer. If Buyer fails to give Seller written notice of its desire to purchase upon such terms and conditions within such ninety (90) days, Seller may thereafter sell to any other party but Seller shall not sell to any other party upon any better terms and conditions than those offered to Buyer without again giving Buyer the ninety (90) day right of refusal described above.

"If Buyer fails to exercise its rights to purchase after notice given by Seller and Seller thereafter sells to any other party upon the same terms and conditions previously offered to Buyer, Buyer may at its option terminate this agreement forthwith. In advance of any sale as aforesaid, Seller may advise Buyer of the name of the prospective purchaser and thereupon may require Buyer to make its election whether to terminate this agreement, contingent upon such sale, and upon failure of Buyer to make such election, Seller may assign this agreement to such prospective purchaser in such sale. Otherwise, Seller shall make no assignment of this agreement without Buyer's written consent.

"(b) Seller shall have the right to discontinue the operation of its Keystone Mine at any time upon six (6) months' prior written notice to Buyer, in which

event the obligations of both parties shall cease: Provided, however, that subject to the consent of Seller's lessor, Buyer shall have the option, exercisable within six (6) months following receipt of Seller's written notice of discontinuance, either (i) to purchase such Keystone mining operation at its fair market value, or (ii) to lease from Seller such Keystone mining operation until the expiration of this agreement, or any extension thereof, or for any shorter period (but not less than five years), at an annual rental, payable to Seller, equal to six percent (6%) of the fair market value of such equipment and other property used by Seller in said Keystone mining operation, as Buyer may deem necessary for said Keystone mining operation, plus the assumption by Buyer of Seller's obligations under Seller's lease. Buyer shall maintain and keep in good repair such equipment and other property and surrender same to Seller at the end of such lease period in as good condition as when Buyer received it, ordinary wear and tear excepted. Fair market value of said Keystone mining operation and fair market value of said equipment and other property used by Seller in said Keystone mining operation, and the applicable date of such fair market value, shall each be determined by an independent, disinterested, competent and properly qualified appraiser to be elected by agreement between Seller and Buyer, or, failing such agreement, by arbitration as provided in Article 12 of this agreement."

C. Contract with SOMISA to supply coal to Argentina Steel Plant, expiring at the end of 1962, with right of SOMISA to extend from year to year thereafter to 1966. A provision of this contract states that neither party shall have the right to partially or totally transfer this order without agreement of the other.

There are a couple of minor agreements whereby Eastern has appointed agents for sales of coal, but these pose no transfer problems.

Inasmuch as Castner, Curran & Bullitt, Inc., Eastern Gas and Fuel Argentina S.R.L., Eastern Gas and Fuel (Combustiveis) Ltds., and New England Coal and Coke Company are separate corporate entities, although related in a practical business way to the Coal Division of Eastern, we have not examined their agreements, contracts, commitments, etc., since we assume they will retain their current separate corporate status.

III - GENERAL AND MISCELLANEOUS MATTERS

Other areas in a transfer of assets of this nature in which problems could arise and should be considered are as follows:

1. Personnel problems involving pension and allowance plans, group and other insurance, workmen's compensation (Coal Division is self-insured), unemployment compensation (transfer of experience rating) and union contract (UMWA national and local agreements).

2. Bulk sales laws.

Eli Goldston

Law Department
November 7, 1962

PROPOSED TRANSFER OF COAL DIVISION ASSETS TO A CORPORATION

3. Appraisal statutes regarding sale of assets and stockholders' rights.

4. Pending litigation.

5. Possible questions raised by title companies as to status of ownership and manner of transfer of titles to real estate in Pennsylvania held in name of Massachusetts Trust.

6. Other corporate entities and organizations related solely to the Coal Division, such as Eastern Gas and Fuel Recreation Camps, Inc., Indian Creek Valley Mine Drainage Company, Winstock Land Corporation, EGFA Federal Credit Union, should be given consideration.

7. Assignability of miscellaneous contracts and agreements such as office space leases, purchase agreements, equipment guarantees, informal or verbal understandings, etc., we do not believe pose any serious problems.

We have given no consideration to any problems that might arise by virtue of Eastern's Declaration of Trust or Bond Indenture instruments.

We hope the foregoing is what you had in mind, but if you desire any more detail on the above or in other areas, please let us know and we will be happy to work up all that may be of help.

CORPORATE

CASH

MANAGEMENT

MANUAL

EASTERN GAS & FUEL

* * * *

EGFA 6/79
5A 5B1

- The subsidiary Treasurer has specified funds availability for a certain period of time only.

- The subsidiary Treasurer has an emergency cash need and the cash has not been put to an alternative use at the parent company.

Each subsidiary reviews the balance in its advance accounts in the last month of each quarter and at year end in conjunction with target dividend payout as described in 5B below.

5B POLICY–DIVIDENDS FROM SUBSIDIARIES AND REVIEW OF ADVANCE ACCOUNTS

5B1 Policy–Dividends from Subsidiaries

The EGFA dividend payout ratio to shareholders will depend upon the current dividend level and net income for a particular year. The Funds for dividends are supplied by the subsidiaries. Since each subsidiary's growth rate and capital needs differ, the following target payouts have been set for each location:

- EACC - 100% of net income plus cash flow in excess of book depreciation and cost depletion

- Midland - 40% of net income

- BGAS - 90% of net income

- Coke - 100%

The resulting amounts are included in the annual forecast as a dividend. (See 15B in the Corporate Accounting Policy Manual.) The timing of these dividends from subsidiaries is adjusted by the EGFA Treasurer to ensure that there are sufficient subsidiary dividends received to satisfy the dividend to stockholder requirements.

If the results of the subsidiary's forecast show a cash need, the subsidiary may borrow externally to finance its dividend requirements to Eastern. Each subsidiary Treasurer discusses each borrowing situation as it arises with the parent company Treasurer.

* * * *

ARTHUR
ANDERSEN
& Co.

EASTERN ASSOCIATED COAL CORP.
AND SUBSIDIARIES

(A Wholly Owned Subsidiary of
Coal Properties Corp.)

CONSOLIDATED FINANCIAL STATEMENTS
AS OF DECEMBER 31, 1986 AND 1985
TOGETHER WITH AUDITORS' REPORT

* * * *

EASTERN ASSOCIATED COAL CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME
AND RETAINED EARNINGS
FOR THE YEARS ENDED DECEMBER 31, 1986 AND 1985

	1986	1985
NET SALES AND OPERATING REVENUES	$436,239,047	$470,139,619
OPERATING COSTS AND EXPENSES		
Cost of sales and mine operating expenses	$344,155,659	$390,530,258
Depreciation, depletion and amortization (Note 5)	19,126,196	22,681,487
Write-down of mining assets (Note 6)	—	39,375,753
Selling, general and administrative expenses	17,839,228	17,907,479
Taxes, other than Federal income	39,891,042	40,887,972
	$421,012,125	$511,382,949
INCOME (LOSS) FROM OPERATIONS	$ 15,226,922	$(41,243,330)
OTHER INCOME (EXPENSE) (NOTE 12)	4,147,340	5,898,110
INTEREST EXPENSE (NOTE 4)	6,826,783	6,041,912
INCOME (LOSS) BEFORE BENEFIT FOR FEDERAL INCOME TAXES	$ 12,547,479	$(41,387,132)
BENEFIT FOR FEDERAL INCOME TAXES (NOTE 3)	(22,532)	(25,812,480)
NET INCOME (LOSS)	$ 12,570,011	$(15,574,652)
RETAINED EARNINGS, BEGINNING OF YEAR	107,475,219	123,049,871
DIVIDEND TO COAL PROPERTIES	24,162,854	—
RETAINED EARNINGS, END OF YEAR	$ 95,882,376	$107,475,219

The accompanying notes are an integral part of these consolidated statements.

* * * *

ARTHUR
ANDERSEN
& CO.

COAL PROPERTIES CORP.
AND SUBSIDIARIES

(A Wholly Owned Subsidiary of
Eastern Gas and Fuel Associates)

CONSOLIDATED FINANCIAL STATEMENTS
AS OF DECEMBER 31, 1986 AND 1985
TOGETHER WITH AUDITORS' REPORT

* * * *

COAL PROPERTIES CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME
AND RETAINED EARNINGS
FOR THE YEARS ENDED DECEMBER 31, 1986 AND 1985

	1986	1985
NET SALES AND OPERATING REVENUES	$482,618,469	$495,507,961
OPERATING COSTS AND EXPENSES		
Cost of sales and mine operating expenses	$383,115,014	$413,605,038
Depreciation, depletion and amortization (Note 5)	23,628,968	24,742,402
Write-down of mining assets (Note 6)	—	39,375,753
Selling, general and administrative expenses	18,216,213	17,975,872
Taxes, other than Federal income	43,987,821	42,744,487
	468,948,016	538,443,552
INCOME (LOSS) FROM OPERATIONS	$ 13,670,453	$(42,935,591)
OTHER INCOME (EXPENSE) (NOTE 13)	4,827,464	6,471,002
INTEREST EXPENSE (NOTE 4)	10,660,113	10,184,829
INCOME (LOSS) BEFORE PROVISION (BENEFIT) FOR FEDERAL INCOME TAXES	$ 7,837,804	$(46,649,418)
PROVISION (BENEFIT) FOR FEDERAL INCOME TAXES (NOTE 3)	(2,764,950)	(26,793,489)
NET INCOME (LOSS)	$ 10,602,754	$(19,855,929)
RETAINED EARNINGS, BEGINNING OF YEAR	16,712,877	36,568,806
DIVIDEND TO EASTERN	33,195,159	—
RETAINED EARNINGS (DEFICIT) END OF YEAR	$ (5,879,528)	$ 16,712,877

The accompanying notes are an integral part of these consolidated statements.

* * * *

STOCK EXCHANGE AGREEMENT

between

PEABODY HOLDING COMPANY, INC.

and

EASTERN GAS AND FUEL ASSOCIATES

March 31, 1987

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SCHEDULES

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EXHIBIT A FORM OF INDEMNIFICATION AGREEMENT
EXHIBIT B FORM OF ROPES & GRAY OPINION
EXHIBIT C FORM OF WHITE & CASE OPINION

STOCK EXCHANGE AGREEMENT

Stock Exchange Agreement, dated as of March 31, 1987 (herein called "this Agreement") by and between Eastern Gas and Fuel Associates, a Massachusetts business trust (herein called "Eastern") , and Peabody Holding Company, Inc., a New York corporation (herein called "Peabody").

WITNESSETH:

WHEREAS, Eastern owns all of the outstanding shares of common stock of Coal Properties Corp., a Delaware corporation (herein called "CPC");

WHEREAS, Peabody desires to acquire such stock in exchange for 15.01% of the outstanding shares of Peabody common stock and Eastern desires to effect the exchange of such stock, all upon the terms and conditions herein set forth; and

WHEREAS, simultaneously with the closing of the transactions hereunder a closing will be held under the MCBL Stock Exchange Agreement of even date herewith between Eastern and Mid-Continent Barge Lines, Inc. ("MCBL") pursuant to

which Eastern will exchange 100% of the shares of preferred stock of CPC for 75,050 shares of common stock of MCBL (the "MCBL Stock Exchange Agreement").

NOW, THEREFORE, in consideration of the premises and the respective agreements herein set forth and for the purpose of consummating such transaction, Eastern and Peabody hereby agree as follows:

1. Definitions. The following terms when used in this Agreement shall, unless the context otherwise requires, have the following meanings:

(a) An "Affiliate" of a specified company shall mean any corporation, firm, partnership, joint venture or other business organization, wherever incorporated or organized, of which such specified company or a Subsidiary thereof shall own ten per cent (10%) or more, but less than a majority, of the voting capital stock or equivalent capital interest.

* * * *

indicated. The books and records of CPC and its Subsidiaries and Affiliates reflect, respectively, all transactions of CPC and its Subsidiaries and Affiliates in conformity with generally accepted accounting principles as applied in accordance with customary coal mining industry practice.

(k) Absence of Undisclosed Liabilities. Except as and to the extent (i) reflected and reserved against in the financial statements referred to in Section 2(j) above, (ii) disclosed in other Schedules to this Agreement or the letter of counsel referred to in Section 2(n), (iii) of liabilities and obligations incurred in the ordinary course of business since February 28, 1987 and (iv) liabilities and obligations incurred in connection with, and specifically contemplated by this

Agreement, neither CPC nor any Subsidiary or Affiliate of CPC has incurred any liabilities or obligations of any nature (whether absolute, accrued, contingent or otherwise) which (x) are material to CPC and such Subsidiaries and Affiliates taken as a whole, and (y) with respect to any unasserted claim, a potential claimant has manifested to CPC or any such Subsidiary or Affiliate a present intention to assert a possible claim.

(l) Tax Matters. Eastern, as common parent of the affiliated group including CPC and its corporate Subsidiaries, CPC, and each Subsidiary and Affiliate of CPC, have duly filed, within the times and in the manner prescribed by law, all tax reports and returns which are required to be filed and each has paid all taxes, interest and penalties as shown on said reports and returns and on all assessments received by Eastern, CPC and each Subsidiary or Affiliate of CPC, as the case may be (except such assessments which are being contested in good faith by appropriate proceedings disclosed on Schedule 2(l)(i), item 1 hereto or for which adequate reserves identified on Schedule 2(l)(ii), item 1 hereto have been made), to the extent that such taxes, interest and penalties have become due. All tax liabilities or other fiscal charges of CPC, its corporate Subsidiaries and Affiliates attributable to taxable periods on or prior to the Closing Date (determined by employing the principles of Section 10(c), second paragraph) that have not yet been paid, have in the

* * * *

date $6,000,000 in cash and the option herein granted to Peabody to acquire from Eastern all of the capital stock of Charles shall thereupon be cancelled. It is also agreed that Eastern shall have no obligation to make such $6,000,000 payment if Peabody exercises such option and acquires all of

the capital stock of Charles or becomes obligated to do so and fails to perform.

During the period that Peabody holds the option to acquire all of the capital stock of Charles, Eastern agrees that, unless the prior written consent of Peabody shall have been obtained authorizing any exception or modification thereto, it will cause Charles to conduct its affairs so as to comply with clauses (i) through (xxi) of Section 4(a) of this Agreement substituting in said clauses "Charles" for "CPC" as appropriate and Section 10(i) of this Agreement; provided, however, that nothing contained herein shall obligate Eastern or Charles to take any action or refrain from taking any action that would cause either Eastern or Charles to commit a breach of its obligations under the Control Agreement or the Venture Agreement. Eastern will consult with Peabody concerning Federal income tax matters pertaining to Charles and shall provide Peabody with copies of draft and final income tax returns pertaining to Charles as soon as practicable after receipt for as long as Peabody has the option to acquire Charles.

Eastern agrees to indemnify and hold Peabody, its Subsidiaries and Affiliates and its or their successors harmless against all damages, losses and out-of-pocket expenses caused by or arising out of any claim by Bluestone or Walnut that the foregoing arrangement involves a breach of, interference with or frustration of, the Control Agreement or the Venture Agreement by Eastern or Peabody or any of their Subsidiaries or Affiliates.

5. Covenants and Agreements of Peabody.

(a) Conduct of Business. Peabody covenants and agrees that from and after the date of this Agreement and until the Closing Date, except as Eastern shall otherwise specifically consent to in writing which consent shall not be unreasonably withheld, Peabody will, and will cause its Subsidiaries to, conduct their affairs so that Peabody and its Subsidiaries:

(i) except as permitted by Section 4(f), will not declare, set aside or pay any dividend on, or make any other distribution in respect of, any shares of its capital stock except, in the case of Subsidiaries, to Peabody or any other Subsidiary of Peabody or purchase or otherwise acquire any shares of its capital stock other than the repurchase of shares contemplated in the Repurchase Agreement;

(ii) will not amend their respective Charters or By-laws;

(iii) except for the proposed AEP-Barrick-New York Life transaction, the details of which have previously been disclosed to Eastern, will carry on their respective businesses diligently, in the ordinary course and in substantially the same manner as heretofore;

(iv) will permit Eastern and its authorized officers, employees, attorneys, engineers, accountants and other representatives to have full access to all their properties, records and documents and will furnish to Eastern such additional financial and other information with respect to their business, properties and affairs (including monthly operating and financial reports regularly prepared by them) as Eastern may from time to time reasonably request;

(v) will not enter into any transaction of merger or consolidation.

(b) Assumption of Certain Leases. In connection with the leases and agreements listed in Schedule 5(b) hereto Peabody hereby agrees to cooperate in good faith with

Eastern to effect the substitution of CPC for Eastern thereunder and the full release and discharge of Eastern in connection therewith if each of the following conditions shall be satisfied: (1) the terms of such substitution shall impose no liability or obligation on Peabody or any Subsidiary thereof other than CPC; (2) the obligation of CPC under such substitution shall be unsecured and shall not be, or have associated covenants which are, in violation of any contract or agreement to which Peabody or CPC is a party; and (3) the terms of such substitution shall not, in the good faith judgment of Peabody, have an adverse effect on the value to Peabody of the assumed lease. In respect of those leases listed in Schedule 5(b) under which CPC shall not be substituted for Eastern pursuant to the foregoing provisions, Peabody hereby agrees to cause CPC to .enter into an Indemnification Agreement in the form of Exhibit B hereto. In the event that CPC shall at any time during the term of such Indemnification Agreement fail to meet any obligations thereunder, Peabody agrees to cause such other of its Subsidiaries or Affiliates as shall have adequate means to satisfy the obligations under such Indemnification Agreement to assume CPC's obligations thereunder and to forthwith cure any defaults thereunder, and, in the event that no Subsidiary or Affiliate of Peabody shall be able to meet such obligations then Peabody hereby agrees to assume the obligations under such Indemnification Agreement and to forthwith cure any defaults thereunder.

(c) Welfare Benefits.. Peabody acknowledges that CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto, and Eastern shall not be liable either for the direct payment of any such premium, benefit or cost or by way of indemnification of any such premium, benefit or cost paid by Peabody or any of, its Subsidiaries, including CPC,

EACC and the other Subsidiaries of CPC; it being understood that the foregoing provision does not create any benefits for individuals other than those benefits that they would otherwise be entitled to but for this provision. The class of individuals referred to in the preceding sentence shall be (i) all persons who as of the Closing Date are employed by EACC, CPC or any other Subsidiary of CPC and (ii) all persons who prior to the Closing Date retired or otherwise ceased to be employed by CPC or any of its Subsidiaries (including EACC), exclusive of any such person who as of the Closing Date is employed by Eastern or by a Subsidiary of Eastern other than CPC and CPC's Subsidiaries. It is understood and agreed by Peabody and Eastern that Eastern shall be liable, and shall have no right to indemnification or reimbursement from Peabody or any Subsidiary of Peabody, for payments of premiums and benefits and the reimbursement of benefit costs in respect of any person previously employed by CPC or any of its Subsidiaries (including EACC) who as of or prior to the Closing Date becomes an employee of Eastern or a Subsidiary or Affiliate of Eastern other than CPC or CPC's Subsidiaries and Affiliates.

(d) Retirement Plan Matters.

(1) As of the Closing Date Peabody shall provide to Eastern a definitive list of all persons described in clause M of paragraph 4(e)(1) above who will be continued in the employ of a "transferred entity" (as that term is described in paragraph 4(e)(1) above) and a definitive list of all persons described in clause (i) of paragraph 4(e)(1) above who will be terminated from the employ of the transferred entities (as so defined) as of or immediately after the Closing Date.

(2) If as of the first anniversary of the Closing Date it is determined that the amount ((A + B) - C) deter-

mined under paragraph 4(e)(2) above, where each of the quantities A, B, and C has the meaning given it in such paragraph 4(e)(2), is less than zero, Peabody shall cause to be transferred from the EACC successor trust or the successor thereto, to the trust associated with the Eastern Gas and Fuel Associates Retirement Plan, an amount equal to the absolute value of ((A + B) - C) as determined above, plus interest thereon at the rate of 7-1/2 percent per annum compounded annually for the period beginning on the Closing Date and ending on the date of the transfer described in this paragraph 5(d)(2), which date shall be as soon as practicable after, and in no event more than thirty days after, the first anniversary of the Closing Date. For purposes of the preceding sentence "EACC successor trust" shall have the meaning given it in paragraph 4(e)(2) above. Notwithstanding the foregoing, Peabody shall not be required to cause the asset transfer described in this paragraph 5(d)(2) unless and until Eastern furnishes Peabody with evidence, including an Internal Revenue Service determination letter or an opinion of counsel, acceptable to Peabody that the trust associated with the Eastern Gas and Fuel Associates Retirement Plan is a qualified trust under Section 401(a) of the Internal Revenue Code of 1986. For all purposes, including funding standard account, accounting treatment and other spinoff purposes, Peabody and Eastern agree that the transfer described in this paragraph 5(d)(2), if any, and the transfer or transfers described in paragraph 4(e)(1) above comprise one transaction for purposes of Section 414(l) of the Internal Revenue Code of 1986.

6. Closing. Subject to the terms and conditions of this Agreement, the Closing under this Agreement shall take place at 11 A.M., New York time, on March 31, 1987, at the offices of Messrs. White & Case, 1155 Avenue of the Americas, New York, N.Y., or at such other time and place as may be mutually

agreed upon by Peabody and Eastern. The date and time of Closing are herein sometimes referred to as the Closing Date.

7. Transfer of Securities. Subject to the terms and conditions set forth in this Agreement:

(a) Delivery of CPC Shares. In consideration of the transfer of the Peabody Shares as below provided, Eastern will, on the Closing Date, convey, assign, transfer and deliver to Peabody the CPC Shares by delivery of certificates therefor in duly transferable form together with Stock Transfer Powers duly executed in blank form.

(b) Delivery of Peabody Shares. in consideration of the transfer of the CPC Shares as above provided, Peabody will, on the Closing Date# convey, assign, transfer and deliver to Eastern the Peabody Shares by delivery of certificates therefor.

8. Conditions to Obligations of Peabody. The obligations of Peabody under this Agreement are subject to the satisfaction at or prior to the Closing Date of the following conditions, unless otherwise waived by Peabody.

(a) Warranties and Agreements of Eastern; Officers' Certificate. All representations and warranties of Eastern contained in this Agreement shall be true and correct in all material respects at and as of the Closing Date with the same effect as though such representations and warranties were

* * * *

Schedule 5(c)

Welfare Plans

EACC Health Care Plan

EACC Retiree Health Care Plan

EGFA Long-Term Disability Plan

EGFA Group Life Insurance Plan

EACC AD&D Plan

EGFA Voluntary AD&D Plan

EGFA Travel Accident Insurance Plan

Benefit Plan for UMWA Represented Employees of EACC and Subs

EACC Salary Continuance (Short-Term Disability)

EGFA Employee Transfer and Relocation Program

EACC Mine Rescue Team Insurance

* * * *

BEST AVAILABLE COPY

ZAST, Samuel Eugene 235-10-5990 NO. A1540 (3-19-42)

Blood type - O-A

DATE HIRED	DATE STARTED WORK		DATE LAST WORKED	REASON FOR LEAVING
	1-2-1934	Glen White	3-11-59	OFF WITH PERMISSION - DEATH IN FAMILY
RI 3-23-59	3-23-59		9-21-60	CUT OFF - MINE CLOSED - 9-28-60

1-17-65 45 11.7

12-4 - 2"

EMPLOYMENT—DISCHARGE—PERSONAL HISTORY

COMPANY	LOCATION—PLANT	Date Employed—Hour	Clk. No.	Social Security Acct. No.
Koppers Coal Division	Helen, W. Va.	A. M. P. M.	543	235-10-5990

Last Name	First Name	Middle Name	Rate	Coal Miner's Cert. No.
(M) EAST	Samuel	Eugene		09040
Last Name (Father)	First Name	Middle Name		415-48 (3-13-42)
EAST	William			
Last Name (Mother's Maiden)	First Name	Middle Name		
ALBERT	Lula			
Employee's Address—No. and Street	City and P. O.	State		
	Lester,	W.Va.		

Nationality of Employee	Citizen		Date of Birth	Will be 65
American	Yes X	No	1-17-1905	1970

Male X / Female	Married X / Single	Wid'w'd / Divd.	Separated / Prot'tant X	Catholic / Jew	White X / Colored	Wt.	Ht.	Health	Child'n	Other Dep.	Place of Birth
						157	5'9	Ok	0		Dora, Alabama

From	To	Name and Address—Previous Employer—Last Pay. First	Occupation	Rate	Reason for Leaving
1929	1934	BeBardeleben Col Dora, Ala.	Loader		work bad
1926	1929	Pratt Fuel Co. Dora, Ala	"		" 2

CHANGE OF ADDRESS — CHANGE OF ADDRESS

Employed Glen White 1-2-34

Discharged — Resigned — Date of Severance — Hour A. M. P. M.

Name

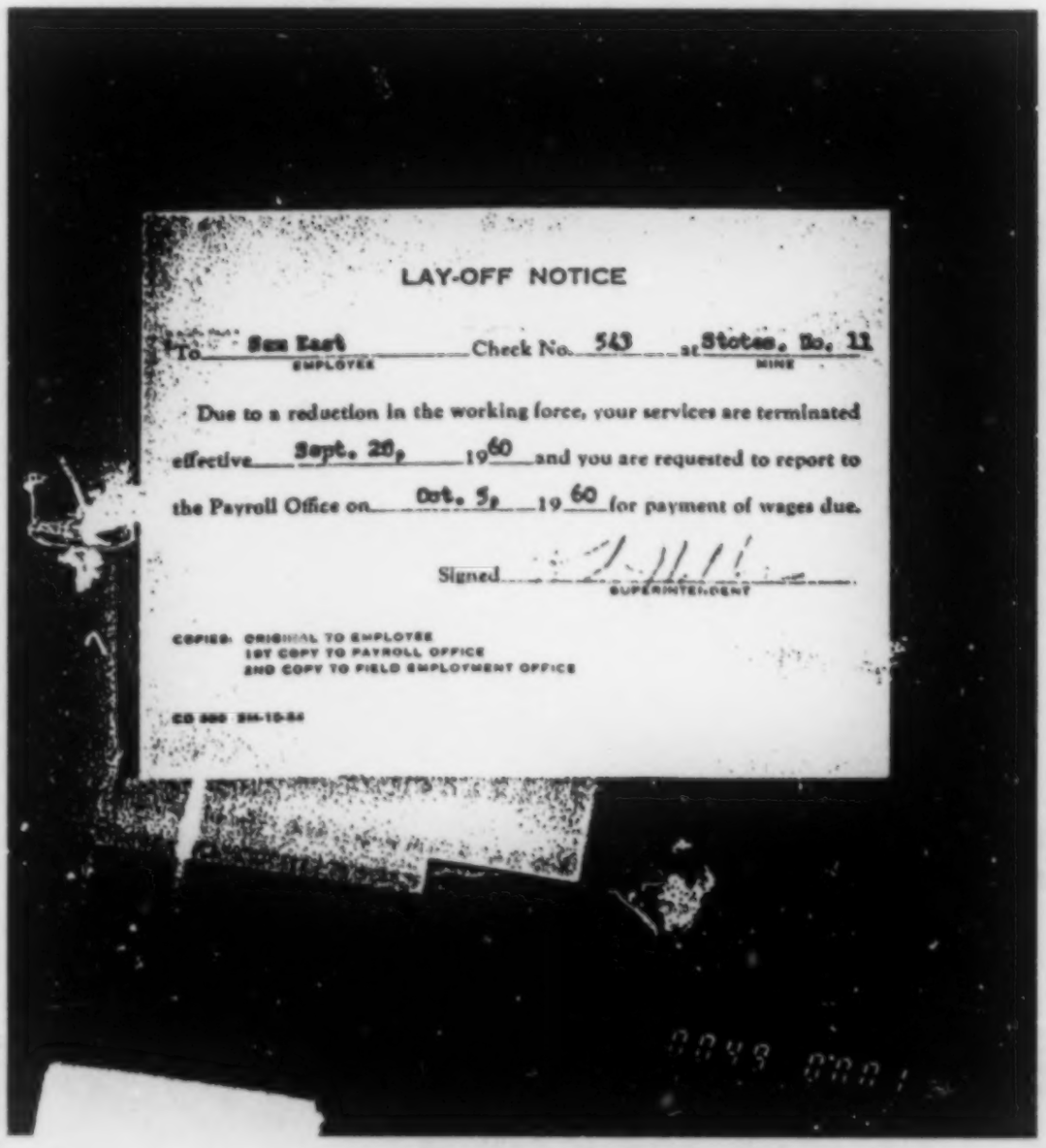
Dept. Head—Foreman

O.K.

For Employment
Samuel East
Signature or Mark of Employee
D. Earl Gray
Witness

O. K.
Plant Supt.

O. K.
Personnel Supervisor



LAY-OFF NOTICE

To Sam East (EMPLOYEE) Check No. 543 at Stotes. No. 11 (MINE)

Due to a reduction in the working force, your services are terminated effective Sept. 28, 1960 and you are requested to report to the Payroll Office on Oct. 5, 1960 for payment of wages due.

Signed _____ (SUPERINTENDENT)

COPIES: ORIGINAL TO EMPLOYEE
1ST COPY TO PAYROLL OFFICE
2ND COPY TO FIELD EMPLOYMENT OFFICE

CO 600 SM-10-54

8043 8001

CO-000 EM 11-59

EASTERN GAS AND FUEL ASSOCIATES
COAL DIVISION
FIELD SEPARATION NOTICE

Stotesbury (MINE OPERATION) #11 (MINE NUMBER)

NAME OF EMPLOYEE (AS SHOWN ON SOCIAL SECURITY CARD): CHECK NUMBER 543

East (LAST) Sam (FIRST) (MIDDLE)

ADDRESS Lester, W. Va. PHONE

OCCUPATION Cutting Mach. Opr. (35-B Jeffrey) SOCIAL SECURITY NUMBER 235-10-5940

CLASSIFICATION: EXCEPT SHIFT ☐ SALARIED ☐ CONTRACT ☒

DATE OF BIRTH 1 (MONTH) 17 (DAY) 1905 (YEAR) YEAR OF CONTINUOUS SERVICE 15 Yrs W ☐ C ☒

FIRST DAY WORKED 6-1-1945 LAST DAY WORKED 9-23-60

SEPARATION PAY. FROM ____ TO ____ AMOUNT $ ____

WAGES IN LIEU OF NOTICE. FROM ____ TO ____ AMOUNT $ ____

REASON FOR SEPARATION

VOLUNTARY QUIT	DISCHARGED FOR CAUSE	DATE*
☐ TO RETURN TO SCHOOL	☐ ABSENTEEISM	
☐ FAMILY TROUBLE	☐ INFERIOR WORK	
☐ TRANSPORTATION	☐ MISCONDUCT	
☐ MOVING FROM LOCALITY	☐ INFRACTION MINE LAWS OR RULES	
☐ BETTER JOB—WHERE?	☐ SAFETY RULE VIOLATION	
☐ HEALTH	☐ REFUSED TRANSFER	
☐ TO FARM	☐ REFUSED TO OBEY ORDERS	
☐ GAVE NOTICE OF ____ DAYS	☐ ____	
☐ OTHER (EXPLAIN)	____ NUMBER OF DAYS	

SOURCE OF INFORMATION ____

OTHER	DATE*
☐ DEATH	
☐ RETIRED	
VOLUNTARY ☐ COMPULSORY ☐	
☒ LAID OFF—LACK OF WORK	
☐ MILITARY SERVICE	

FOREMAN'S REPORT ON JOB PERFORMANCE

	SATISFACTORY	UNSATISFACTORY
SAFETY MINDED	☑	☐
SKILL ON JOB	☑	☐
ATTENDANCE RECORD	☑	☐
ACCEPTANCE OF ORDERS	☑	☐
COOPERATION	☑	☐

WOULD YOU REHIRE YES ☐ NO ☑

SIGNED ____ (IMMEDIATE FOREMAN) SIGNED A T Bugar (GENERAL FOREMAN)

OTHER COMMENTS Because age

SIGNED—MINE ACCOUNTANT D A Morris APPROVED SUPT F. J. Wolf

*FILL IN DATE IF DIFFERENT FROM "LAST DAY WORKED"

COPY TO INDUSTRIAL RELATIONS DEPARTMENT AT MT. HOPE, W. VA.

0049 0013

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

AFFIDAVIT OF KYU LEE

I do hereby depose and say as follows:

1. I am the Assistant Director of Eligibility Services of the United Mine Workers of America Health and Retirement Funds (the "Funds"). The Funds currently consist of several multiemployer benefit plans, including two multiemployer welfare plans and two multiemployer pension plans, namely, the United Mine Workers of America Combined Benefit Fund (the "Combined Fund"), the United Mine Workers of America 1992 Benefit Plan *the "1992 Benefit Plan"), the United Mine Workers of America 1950 Pension Plan, and the United Mine Workers of America 1974 Pension Plan. Prior to the creation of the Combined Fund on February 1, 1993, the Funds consisted of the two pension plans identified above as well as two private multiemployer welfare plans known as the United Mine Workers of America 1950 Benefit Plan and Trust (the "1950 Benefit Plan") and the United Mine Workers of America 1974 Benefit Plan and Trust (the "1974 Benefit Plan"). The 1950 Benefit Plan and 1974 Benefit Plan were the successors to the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"), which was created by the National Bituminous Coal Wage Agreement of 1950. The 1950 W&R Fund was the successor of the United Mine Workers of America Welfare and Retirement Fund of 1947 (the 1947 W&R Fund"), which was itself the successor of the United Mine workers of America Welfare and Retirement Fund (the "1946 W&R Fund") that was created by a 1946 agreement between the United Mine Workers of America ("UMWA") and the United States.

2. As Assistant Director of Eligibility Services of the Funds, I am responsible for making final eligibility determinations for benefits provided by the Funds.

3. I make this affidavit based on my review of the business records of the Funds, which consist of records made at or near the time by, or from information transmitted by, a person with knowledge and which are kept by the Funds in the course of regularly conducted business activities.

4. I have reviewed the Funds' records regarding the Samuel E. East, a deceased beneficiary of the United Mine workers of America 1950 Benefit Plan.

5. The records of the Funds indicate that Mr. East was employed by Plaintiff Eastern Enterprises (formerly known as Eastern Gas and Fuel Associates) ("Eastern") from January 2, 1934 to September 28, 1960.

6. Subsequently, Mr. East worked for the CC & L Coal Company from July 20, 1962 to March 15, 1963. On or about March 15, 1963 CC & L Coal Company changed its name to Calvert Coal Company. Although the company changed its name, Mr. East continued to work for the company until January 9, 1967. A review of the Funds' records indicates that the CC & L Coal Company/Calvert Coal Company was a NBCWA signatory employer during the period may 1, 1959 through December 5, 1977, at which time it went out of business.

7. Shortly after leaving employment with the Culvert Coal Company, Mr. East retired and applied for benefits from the 1950 W&R Fund.

8. Mr. East was a beneficiary of the 1946 W&R Fund, the 1947 W&R Fund and 1950 W&R Fund from those plans' inception, and received health benefits from them while he was working for Eastern, the CC & L Coal Company and the Calvert Coal Company. After his retirement in 1967, he

continued to be a beneficiary of the 1950 W&R Fund's successor, the 1950 Benefit Plan.

9. Mr. East's spouse was a beneficiary of the 1950 Benefit Plan on July 20, 1992 and thereafter became a beneficiary of the Combined Fund.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 4/12/95 /s/Kyu Lee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Caption Omitted)[1]

FEDERAL DEFENDANT'S RESPONSE TO EASTERN ENTERPRISES' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO DISPUTE

Federal Defendant Shirley S. Chater, Commissioner of Social Security hereby joins Defendant UMWA Combined Fund and Its Trustees' Response to Plaintiffs' Statement of Material Facts as to Which There Is No Dispute served on April 14, 1995.

DATED: April 14, 1995

Respectfully submitted,

Frank W. Hunger
Assistant Attorney General

Donald K. Stern
United States Attorney

Suzzane Durell
Assistant U. S. Attorney

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[1] [Footnote was in caption.] Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, the function of the Secretary of Health and Human Services in Social Security and related cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with Fed. R. Civ. P. 25(d) and §106(d) of Pub. L. No. 103-296, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services.

/s/ Brian G. Kennedy

/s/ Gretchen E. Jacobs
Trial Attorney

Federal Programs Branch
Civil Division
Department of Justice
Room 922
901 E. Street, N.W.
Washington, D.C. 20530
(202) 514-3489
Fax: (202) 616-8202

OF COUNSEL:
Randolph W. Gaines
A. George Lowe
John M. Sacchetti
Mark S. Ledford
Retirement, Survivors
and Supplemental Assistance
Litigation Branch,
Office of General Counsel,
Social Security administration

Attorneys for Defendant
Commissioner Chater

SSA-1826
VERSION 1984.002

ITEMIZED STATEMENT OF EARNINGS
* * * FOR SSN 235-10-5990 * * *

* * * *

FROM: SOCIAL SECURITY ADMINISTRATION
OFFICE OF CENTRAL RECORDS OPERATIONS
BALTIMORE, MARYLAND 21235-0000

NUMBER HOLDER NAME:
SAMUEL E EAST

PERIODS REQUESTED JANUARY 1946 TO DATE

YEAR	JAN-MARCH	APRIL-JUNE	JULY-SEPT	OCT-DEC	TOTAL

EMPLOYER NUMBER: 04-1270730
EASTERN ENTERPRISES
9 RIVERSIDE RD
WESTON, MA 02193

1946	795.34	602.31	1,017.16	585.19	$ 3,000.00
1947	1,027.17	925.64	879.79	167.40	$ 3,000.00
1948	955.42	971.67	1,072.91		$ 3,000.00
1949	778.75	1,012.15	484.53	437.02	$ 2,712.45
1950	536.23	1,045.31	815.89	602.57	$ 3,000.00
1951	1,019.16	1,157.81	986.15	436.88	$ 3,600.00
1952	1,128.98	1,218.38	892.84	359.80	$ 3,600.00
1953	851.47	1,190.04	1,050.99	507.50	$ 3,600.00

SSA-1826
VERSION 1984.002

ITEMIZED STATEMENT OF EARNINGS
* * * FOR SSN 235-10-5990 * * *

YEAR	JAN-MARCH	APRIL-JUNE	JULY-SEPT	OCT-DEC	TOTAL
1954	832.86	986.79	890.52	889.83	$ 3,600.00
1955	1,229.46	1,269.97	1,377.82	322.75	$ 4,200.00
1956	1,469.05	1,763.59	967.36		$ 4,200.00
1957	1,450.89	1,580.48	1,168.63		$ 4,200.00
1958	1,072.35	1,326.24	1,096.66	704.75	$ 4,200.00
1959	851.02	1,543.19	1,007.37	1,239.84	$ 4,641.39
1960	1,445.87	1,711.16	1,396.40		$ 4,553.43

EMPLOYER NUMBER: 55-0437957
C C & L COAL CO.
110 HARVEY ST
BECKLEY, WV 25801

1962			885.86	885.42	$ 1,771.28
1963	486.05				$ 486.05

EMPLOYER NUMBER: 55-0463310
CALVERT COAL COMPANY
110 HARVEY ST
BECKLEY, WV 25801

1963	210.00	972.54	1,033.16	955.05	$ 3,170.75
1964	1,339.75	1,508.37	1,488.37	465.51	$ 4,802.00
1965	1,655.00	1,730.00	1,415.00		$ 4,800.00

SSA-1826
VERSION 1984.002

ITEMIZED STATEMENT OF EARNINGS
* * * FOR SSN 235-10-5990 * * *

YEAR	JAN-MARCH	APRIL-JUNE	JULY-SEPT	OCT-DEC	TOTAL
1966	1,484.17	1,354.75	1,624.66	1,681.50	$ 6,145.08
1967	137.75				$ 137.75

THERE ARE NO OTHER EARNINGS RECORDED UNDER THIS SOCIAL SECURITY NUMBER FOR THE PERIOD REQUESTED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

(Caption Omitted)

ANSWER TO THIRD PARTY COMPLAINT

1. Paragraph 1 states only legal conclusions to which no response is required. To the extent that Paragraph 1 contains any factual allegations, the same are denied.

2. Paragraph 2 states only legal conclusions to which no response is required. To the extent that Paragraph 2 contains any factual allegations, the same are denied.

3. On information and belief, Third Party Defendants admit the allegations of Paragraph 3 of the third party complaint.

4. Third Party Defendants admit the allegations of Paragraph 4 of the Complaint.

5. Third Party Defendants admit the allegations of the first and third sentences of Paragraph 5 of the Complaint. The remaining allegations are denied.

6. Third Party Defendants admit the allegations of Paragraph 6 of the Complaint.

7. Third Party Defendants admit the allegations of Paragraph 7 of the Complaint.

8. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 8 of the Complaint.

9. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 9 of the Complaint.

10. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegation that

Eastern completed the transfer of its coal-related assets to EACC by January 1, 1966. The remaining allegations of Paragraph 10 are denied.

11. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 11 of the Complaint.

12. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 12 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

13. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 13 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

14. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 14 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

15. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 15 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

16. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 16 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and

other documents which documents speak for themselves and require no answer as to their contents.

17. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 17 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

18. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 18 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

19. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 19 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

20. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 20 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

21. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 21 of the Complaint.

22. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 22 of the Complaint.

23. Third Party Defendants admit that Peabody and EACC were signatories to certain collective bargaining agreements

through the Bituminous Coal Operators Association ("BCOA"). The remaining allegations of paragraph 23 of the Complaint are denied.

24. Third Party Defendants admit that on or about March 31, 1987, Peabody Holding Co., Inc. ("Peabody") entered into a stock exchange agreement with Eastern pursuant to which it acquired CPC and indirectly, CPC's subsidiary (EACC). The remaining allegations of Paragraph 24 are denied.

25. Third Party Defendants deny the allegations of paragraph 25 of the Complaint.

26. Third Party Defendants deny the allegations of paragraph 26 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

27. Third Party Defendants deny the allegations of paragraph 27 of the Complaint. Additionally, the allegations made in this paragraph are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents.

28. The allegations of paragraph 28 are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents. Any other allegations are denied.

29. The allegations of paragraph 29 are the subject of written agreements and other documents which documents speak for themselves and require no answer as to their contents. Any other allegations are denied.

30. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 30 of the Complaint.

31. Paragraph 31 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

32. Paragraph 32 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

33. Paragraph 33 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

34. Paragraph 34 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

35. Paragraph 35 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

36. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 36 of the Complaint.

37. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 37 of the Complaint.

38. Third Party Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 38 of the Complaint.

39. Paragraph 39 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

40. Paragraph 40 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

41. Third party defendants lack information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 41 of the Complaint.

42. Paragraph 42 states a legal conclusion to which no response is required. To the extent that the paragraph contains factual allegations, the same are denied.

43. Third Party Defendants deny the allegations of Paragraph 43 of the Complaint.

44. Third Party Defendants deny the allegations of Paragraph 44 of the Complaint.

45. Third Party Defendants deny the allegations of Paragraph 45 of the Complaint.

46. Third Party Defendants deny the allegations of Paragraph 46 of the Complaint.

47. Third Party Defendants repeat and incorporate by reference their answers to Paragraphs 1 through 46 of the Complaint.

48. Third Party Defendants deny the allegations of Paragraph 48 of the Complaint.

49. Third Party Defendants deny the allegations of Paragraph 49 of the Complaint.

50. Third Party Defendants deny the allegations of Paragraph 50 of the Complaint.

51. Third Party Defendants deny the allegations of Paragraph 50 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

This court lacks personal jurisdiction over some or all of the Third Party Defendants.

SECOND AFFIRMATIVE DEFENSE

The Third Party Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Eastern Enterprises is estopped from relying on the acts, omissions, statements and conduct of Eastern Associated Coal Corporation made during the time period that EACC was owned and controlled by Eastern Enterprises, as a basis for establishing liability in this action.

FOURTH AFFIRMATIVE DEFENSE

The claims asserted by Eastern Enterprises are not a proper basis for a Third Party Complaint, given the limited nature of both the Complaint and the Counterclaim.

FIFTH AFFIRMATIVE DEFENSE

Eastern is solely liable under the Coal Act for the miners and beneficiaries assigned to it, since the miners in question worked only for Eastern and never worked for the Third Party Defendants.

SIXTH AFFIRMATIVE DEFENSE

Third Party Defendants never assumed any of the following types of liability of Eastern: Coal Act liability; liability under laws not enacted at the time Eastern transferred certain assets to EACC; unforeseeable liabilities; liabilities not in existence at the time of the asset transfer; and statutorily created liabilities.

SEVENTH AFFIRMATIVE DEFENSE

The Third Party Defendants never assumed any liabilities of Eastern which would obligate them to be responsible for Eastern's obligations under the Coal Act of 1992.

EIGHTH AFFIRMATIVE DEFENSE

The claims of Eastern against the Third Party Defendants are barred by the applicable statute of frauds.

NINTH AFFIRMATIVE DEFENSE

Third Party Defendants are not successors to Eastern, and Eastern lacks standing to claim that Third Party Defendants are its successors.

THIRD-PARTY
DEFENDANTS
By their attorneys,

/s/ KENNETH A. SWEDER
BBO #489840
HOWARD M. BROWN
BBO #547948
THOMAS M. LOONEY
BBO #555040
Kaye, Fialkow, Richmond
& Rothstein
100 Federal Street
Boston, MA 02110
(617) 482-6800

DATED: 3/18/96

(Certificate of Service Omitted)

Supreme Court, U.S.
FILED
DEC 11 1997

No. 97-42

IN THE

Supreme Court Of The United States

October Term, 1997

EASTERN ENTERPRISES,
Petitioner,
v.
KENNETH S. APFEL, COMM'R OF SOCIAL SECURITY, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX
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JOHN T. MONTGOMERY
Counsel of Record
Ropes & Gray
One International Place
Boston, MA 02110
(617) 951-7000
Counsel for Petitioner

SETH P. WAXMAN
Solicitor General of the United States
Department of Justice
950 Penn. Ave., N.W.
Washington, D.C. 20530
(202) 514-2217
Counsel for The Federal Respondent

KENNETH A. SWEDER
Counsel of Record
Stroock & Stroock & Lavan
100 Federal St. 33d Floor
Boston, MA 02110
(617) 482-6800
Counsel for Third Party Respondents Peabody Holding Co., Inc., et. al.

PETER BUSCEMI
Counsel of Record
Morgan, Lewis & Bockius LLP
1800 M. St., N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Respondents UMWA Combined Benefit Fund and Its Trustees

PETITION FOR WRIT OF CERTIORARI FILED JULY 3, 1997
CERTIORARI GRANTED OCTOBER 20, 1997

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COAL COMMISSION REPORT

A Report to the Secretary of Labor and the American People

The Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits

November 1990
Washington, D.C.

COAL COMMISSION
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
Fax: 202-523-3442
202-523-8271

W.J. Usery, Jr.
Chairman
202-466-6260

Henry H. Perritt, Jr.
Vice Chairman
215-645-7078

Curtis H. Barnette
Arlene Holen
Richard M. Holsten
Michael J. Mahoney
Walter J. McNerney
Dr. Max Pepper
Robert H. Quenon
Carl J. Schramm
Richard L. Trumka
Commissioners

Jan Horbaly
Executive Director

November 5, 1990

Honorable Elizabeth Dole
Secretary of Labor
Washington, D.C. 20210

Dear Madam Secretary:

The Coal Commission was created on March 12, 1990 "to focus on health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving these issues on the coal industry as a whole." The Commission also was directed to advise you on:

1. The financial status and prospects of the United Mine Workers of America 1950 and 1974 Pension Trusts (Pension Plans) and 1950 and 1974 Benefit Trusts (Benefit Plans);
2. The provision and means of delivery of health care benefits to coal industry retirees and their dependents who either currently are or formerly were represented by the UMWA; and
3. Arrangements to assure long-term financial viability of the 1950 and 1974 Pension and Benefit Plans.

The Commission is pleased to forward to you its findings and recommendations on the financial status of the 1950 and 1974

UMWA Health and Retirement Funds and on the quality and availability of health care benefits for UMWA retirees.

In general, the Commission reached consensus on a wide range of issues aimed at ensuring the long-term financial stability of the Funds. These issues include imposition of a statutory obligation to contribute on current and past signatories to the National Bituminous Coal Wage Agreement, mechanisms to prevent future dumping of retiree health care liabilities, statutory authority to utilize excess pension assets, and the implementation of state-of-the-art managed care techniques. Of course, a number of factual, legal, financial and policy matters will have to be reviewed as these matters are resolved.

The principal substantive difference among members was on the question of who should provide financing for orphan retirees. Many Commission members believe that orphans represent an industry-wide problem that should be resolved on an industry-wide basis. Others believe that only current and past signatories should be required to finance orphan health care. Implicit in both views is that collective bargaining alone cannot resolve the problem of delivering promised benefits to retirees.

As Chairman, I commend you for the extraordinary people you selected to serve on the Commission. I could not ask for a better group of more highly qualified and truly dedicated public servants to work on the issues referred to the Commission. Each member, serving without remuneration, contributed enormous amounts of time and energy to the issues considered. Together, with an exceptionally strong staff, the members worked tirelessly to solve an extremely difficult and perplexing problem.

Many constructive and creative ideas were presented and discussed, and some forceful arguments were offered in support of varying solutions. This report represents the very best consensus that could be achieved considering the strong views held by different Commission members on the numerous issues addressed.

On behalf of the Commission, I wish to thank those at the Department of Labor and

the many others who helped the Commission accomplish its work. The Commission appreciates too your sincere interest and generous support in helping to solve this very difficult and complex health care problem confronting the coal industry.

Respectfully yours,

/s/ W.J. Usery, Jr.
Chairman

Enclosure

Advisory Commission on
Mine Workers Retiree Health Benefits

EXECUTIVE SUMMARY

The UMWA Health and Retirement Funds (Funds) is a unique institution. It was created in the White House in a contract between the federal government and the UMWA and for 45 years, it has provided comprehensive health care benefits for retired miners and their families. Unfortunately, the combination of skyrocketing health care costs, an increasing number of retirees who have been abandoned by their employers, and a smaller percentage of coal producers making contributions to the UMWA Funds have put the health care program for retirees in a financial crisis.

In the last 10 years, the health care costs paid by the UMWA Health and Retirement Funds have doubled from $117.4 million to $245.3 million. By 1993, the Funds will have an estimated deficit of $300 million. Much of the cost is attributable to "orphaned" retirees whose companies have gone out of business or ceased paying for health care benefits. More than half of the Funds' population is composed of orphan retirees. How to continue to provide health benefits to "orphans" is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem. Health care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits.

The current deficit for the Funds is $114.7 million, and the deficit will continue to grow at the current rate of contribution. A close analysis of the administration and operation of the Funds reveals that they are doing an adequate job in administering the Funds and in providing health care benefits for the retired coal miners. In short, the growing deficit is much broader than the administration of the Funds.

There is consensus, that is, agreement among most of the Commission members, on a number of important issues. The Commission firmly believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored. The Commission agrees that a statutory obligation to contribute to the plans should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement. The Commission agrees that mechanisms must be enacted to prevent future dumping of retiree health care obligations on the Funds. The Commission supports statutory authority for the parties to utilize excess pension assets to reduce existing deficits. Finally, the Commission supports the implementation of managed care and cost containment activities designed to reduce costs without the loss of benefits.

The principal substantive point on which the Commission did not reach consensus is whether the entire industry should contribute to the resolution of the problem of orphan retirees. Many commissioners support the enactment of a small health care fee on current and former signatories, and other coal producers to help pay for health benefits of retirees who have no company to provide such benefits. Others believe that only current and former signatories should be required to contribute. As a result, two alternative approaches for a possible long-term solution are offered by the Commission. It is recognized there may be appropriate modifications to either of these solutions, and that other satisfactory plans could be developed.

Commissioners

Chairman

W. J. Usery, Jr.
Bill Usery Associates
1730 Rhode Island Avenue, N. W.
Washington, D.C. 20036

Vice Chairman

Henry H. Perritt, Jr.
Professor of Law
Villanova University
Villanova, Pennsylvania 19085

Mr. Curtis H. Barnette
Senior Vice President
Bethlehem Steel Corporation
2018 Martin Tower
Bethlehem, Pennsylvania 18016-7699

Mr. Richard M. Holsten
Former President and Chairman
The Pittsburg and Midway
Coal Mining Company
6400 South Fiddlers Green
Circle
Englewood, Colorado 80111

Mr. Walter J. McNerney
J. L. Kellogg Graduate School
of Management
Northwestern University
2001 Sheridan Road
Evanston, Illinois 60208-2007

Mrs. Arlene Holen
2928 Macomb Street, N. W.
Washington, D. C. 20008

Mr. Michael J. Mahoney
Managing Pension Partner
Milliman and Robertson, Inc.
2 Pennsylvania Plaza
New York, New York 10001

Dr. Max Pepper
53 Old Sunderland Road
Montague, Massachusetts 01351

Dr. Carl J. Schramm
President
Health Insurance Association of
America
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Robert H. Quenon
President and Chief Executive
Officer
Peabody Coal Company
301 North Memorial
St. Louis, Missouri 63102

Mr. Richard L. Trumka
International President
United Mine Workers of
America
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Executive Director

Jan Horbaly
Coal Commission
U.S. Department of Labor
Washington, D.C. 20210-0001

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INTRODUCTION

A. Creation of the Commission. On March 12, 1990, Secretary of Labor Elizabeth Dole appointed an 11-member Commission to review and make recommendations concerning the financial crisis confronting the 1950 and 1974 UMWA (United Mine Workers of America) Benefit Funds. Secretary Dole appointed W.J. Usery, Jr. to serve as Chairman of the Advisory Commission on United Mine Workers of America (UMWA) Retiree Health Benefits (the Commission) and directed the Commission to present its findings and recommendations to her by October 11, 1990. On September 27, 1990, Secretary Dole extended the Commission's reporting date to October 17, 1990, to permit the public additional time to make presentations and submit materials to the Commission for consideration. On October 18, 1990, Secretary Dole extended the Commission's reporting date to October 31, 1990 to allow the Commission members time to submit written proposals and statements for inclusion in the final report. On November 1, 1990, Secretary Dole extended the Commission's reporting date to November 5, 1990 to allow additional time for preparation and submission of the Commission's final report.

B. Statement of the Problem. The medical care program for retired coal miners represents a unique history of cooperation and confrontation between the private sector and the government. The UMWA Health and Retirement Funds were created in an agreement between the federal government and the United Mine Workers of America during a period of government seizure of the mines. It was shaped by a federally-appointed commission charged with examining health care in America's coal fields. Over the years, it has been recognized by specific legislative treatment, reshaped by numerous court decisions and kept alive in times of peril by government intervention in the collective bargaining process.

Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they

planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

The Commission was asked to examine the problem and to recommend a solution for assuring that orphan retirees in the 1950 and 1974 Benefit Trusts will continue to receive promised medical care. To deal effectively with its charge, the Commission had to consider the unique nature of the Funds; the sharp decline in the contribution base supporting them; the rapidly escalating medical care costs; and the strong historical tie among the Funds, its beneficiaries and the collective bargaining relationship which has been in place for over 40 years. In short, the Commission was asked to reconcile the changing landscape of the coal industry with the legitimate demands of history.

The 1950 and 1974 Benefit Funds are in financial crisis for several reasons. First, the number of coal companies making contributions to the Funds has declined significantly. In 1950 the companies making contributions to the Funds accounted for 80 percent of the coal produced in the nation; by 1990 companies making contributions to the Funds account for only 30 percent of national coal production. Second, the cost of providing health care to retired miners and their families has increased significantly from 1950 to 1990. In the last 10 years alone, the total cost of health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million. Third, there has been a steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits. The combination of these factors has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in financial crisis.

While the 1950 and 1974 UMWA Benefit Funds are inadequately funded, the 1950 UMWA Pension Fund is over funded by approximately $237 million, assuming the current plan actuaries assumptions are realized. This surplus of pension funds has prompted legislative proposals (1) to

transfer some of these excess assets to the Benefit Funds and (2) to require certain coal operators--who were, but who are now no longer contractually obligated to make contributions--to resume making contributions to the Benefit Funds.

The crisis created by the high cost of health care is not unique to the coal industry. It is a major problem in the United States and one that affects much of American industry. The need to provide quality health care for American workers is a national challenge and, according to Secretary Dole, this challenge affects the "entire work force and [America's] competitive edge in the world market." The high cost of health care is the main issue in 87 percent of the labor disputes and is an issue that will dominate the collective bargaining process in the years to come.

On January 1, 1990, the parties to the strike at the Pittston Coal Company reached a settlement in their 10-month-long labor dispute, and on February 19, 1990, a new four-and-a-half-year contract was ratified by members of the UMWA. The payment of health care benefits to retired and disabled miners and their families was a major issue in the strike and was responsible in large measure for the subsequent formation of this Commission.

The current deficit for the 1950 and 1974 UMWA Health Benefit Funds is $114.7 million. By 1993, the deficit for the 1950 and 1974 UMWA Health Benefit Funds is expected to be more than $300 million. Secretary Dole contends that in order "to avoid a [more] serious crisis [in the future]," a "long-term resolution is needed" to deal with the problem of accelerating health care costs in the coal industry. That crisis could come as early as 1993 when collective bargaining commences between the UMWA and members of the Bituminous Coal Operators' Association (BCOA) on a successor agreement to the expiring 1988 National Bituminous Coal Wage Agreement (NBCWA).

The federal courts also have been active in resolving disputes concerning the operation and contributions to the Funds. In addition, Congress has enacted legislation affecting the coal industry, most recently, the Clean Air Act, and has

considered legislation authorizing the transfer of money from the 1950 Pension Fund to the 1950 Benefit Fund.

The escalating cost of providing adequate health care to coal miners and their families, particularly the increasing population of orphan retirees, cannot properly or fairly be solved by the parties through collective bargaining alone. The Secretary of Labor's creation of this Commission is evidence in itself that the issue facing the Funds is not one that lends itself to resolution through negotiation and mediation. The problem of the escalating cost of health care is a problem of potentially great magnitude which today is threatening to bankrupt the UMWA Health and Retirement Funds, and which tomorrow may threaten the financial solvency of union and nonunion coal mining companies alike. In short, at the present rate of inflation in health care costs, many companies over the longer term may not be able to provide health care coverage for their employees because the cost of health care may exceed the company's profits.

The time to deal with the problem is now before it becomes even more serious. If the coal industry and government can work together to solve this problem as it has worked together to solve problems in the past, the whole nation can benefit from the results. Not only will the coal industry remain healthy, but the nation too can benefit from the results achieved from the cooperative effort of the industry and the government.

C. Charge of the Commission. For these reasons, Secretary Dole created the Coal Commission and directed it "to focus on health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving these issues on the coal industry as a whole." In particular, she asked the Commission to advise her on:

1) The financial status and prospects of the United Mine Workers of America 1950 and 1974 Pension Trusts (Pension Plans) and 1950 and 1974 Benefit Trusts (Benefit Plans);

2) The provision and means of delivery of health care benefits to coal industry retirees and their dependents who either currently are or formerly were represented by the UMWA; and

3) Arrangements to assure long-term financial viability of the 1950 and 1974 Pension and Benefit Plans.

The members appointed by Secretary Dole to serve on the Coal Commission have a wide range of experience and represent all facets of the coal industry. The union, coal operators--both BCOA and non-BCOA, the private insurance industry, as well as academics, actuarial, medical and government policy experts, and those with extensive experience in labor law, mediation, and labor negotiations make up the membership. According to Deputy Secretary of Labor Roderick A. DeArment, who opened its first meeting, the Commission will have "free reign to explore any and all solutions" to the financial crisis confronting the 1950 and 1974 Benefit Funds.

D. Work of the Commission. In achieving the objectives set forth by the Secretary of Labor, the Commission reviewed the history of the trust funds and the types of health care benefits beneficiaries are entitled to receive. The members also reviewed the financial status of the health care and pension trust funds, and examined projected costs and expenditures for a 20-year period. In addition, the Commission analyzed how the health care trust funds are managed. Based on the information considered and examined, the Commission reached the findings and conclusions set forth in the report and submit their recommendations for ensuring the integrity of retiree health benefits in the coal industry.

CHAPTER ONE

THE COAL INDUSTRY

A. The Industry. In the United States the domestic coal industry continues to grow in both size and strategic importance as the nation's most abundant and economic basic energy resource. In 1990 domestic coal production should reach 1 billion tons, marking the fourth consecutive year of growth. Valued at an estimated $21 billion today, domestic coal production ranks as one of the nation's most important basic industries.

B. Background. Coal had its origin millions of years ago in the lush forests and dense swamps that once covered vast areas of the earth's surface. Over the intervening ages, this vegetative matter was subjected to different sets of temperatures and pressures and became a solid hydrocarbon rather than a gaseous or a liquid one.

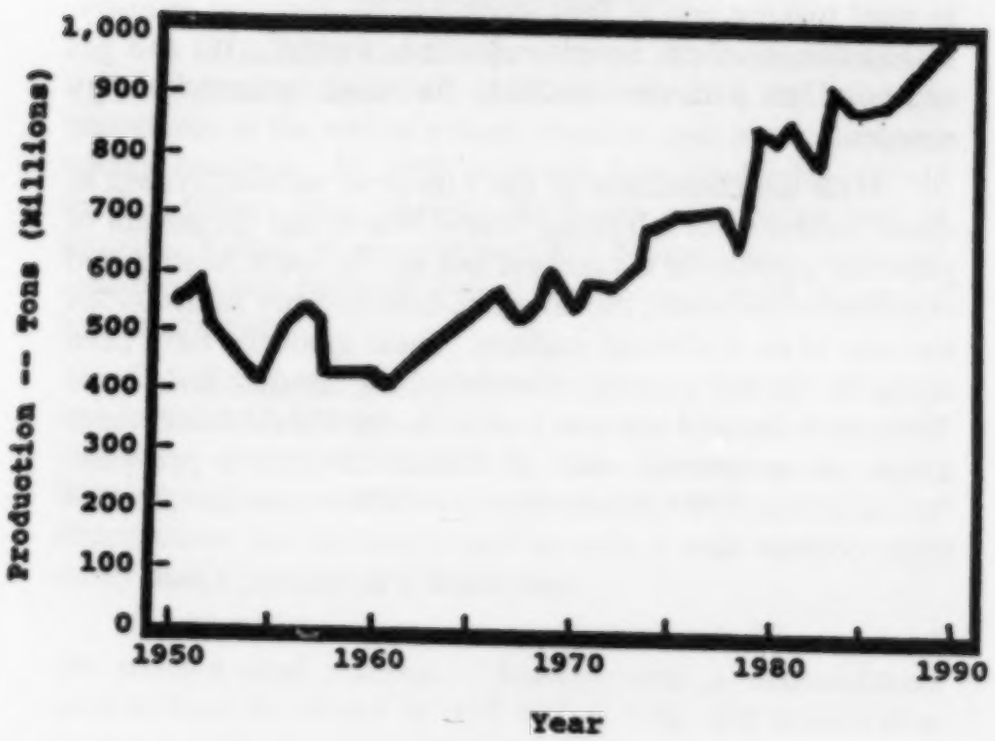
The United States possesses approximately 35 percent of the world's coal reserves. Indeed, with a demonstrated reserve base in excess of 470 billion tons and recoverable reserves of nearly 270 billion tons, U.S. coal reserves exceed the entire world's supply of oil and gas and are adequate to meet today's demand levels for centuries to come.

Geologically, the oldest and highest quality coals are found in numerous seams throughout much of Appalachia. Midwestern and Rocky Mountain coal deposits are generally younger and of somewhat lower quality while the youngest and lowest quality coals are the vast lignite deposits of the northern Great Plains and the Gulf Coast states. Coal quality is generally measured by heat content and residual impurities and it can vary considerably from region to region, from seam to seam and even within a given seam. Of particular interest today is sulfur content which can range from very low to medium or high depending upon the prevailing geologic conditions when the coal was formed.

C. Coal Utilization and Production. As with other primary energy sources, coal is used principally for the heat

that is released upon combustion which can transform water into high temperature, high pressure steam to perform useful work. Certain coals also contain chemical properties needed in steel making and as feed stock for the chemical industry. In addition, coal can be converted into synthetic oil and gas and used as a direct substitute for these primary energy sources.

With the conversion of the American railroad system to diesel locomotives following World War II and the advent of plentiful supplies of natural gas and oil for space heating and commercial purposes, the domestic coal industry in the 1950s lost two of its traditional markets. These gradually have been replaced by the growing electric utility market and, since 1960, coal demand and production in the United States have grown at an average rate of almost 5 percent per year. Production in 1990 should exceed 1 billion tons for the first time. (Figure 1)



(FIGURE 1)

Today, about 86% of the coal produced in the United States is used to generate electricity and accounts for nearly 56% of the nation's total electric power production. In addition, approximately 10% of industry output is exported to the European Common Market, South America, and Pacific Rim countries and contributes significantly to our international trade balances. The remaining production is consumed by heavy industry for processing and steel making purposes.

Coal is produced in 26 States with 60 percent mined east of the Mississippi River. The five largest coal producing States, accounting for nearly two-thirds of the nation's output, are Wyoming, Kentucky, West Virginia, Pennsylvania and Illinois. Other major producers are Texas, Virginia, Montana, Indiana, and Ohio.

Nearly two-thirds of the nation's output comes from surface mines which use large mobile excavating equipment to remove the overburden and expose coal seams located within a few hundred feet of the surface. Upon completion of mining, the surface is then restored to its approximate original contour and to pre-mined levels of vegetative productivity. Underground mining is also highly mechanized with yesterday's picks and shovels replaced by continuous mining machinery that safely and economically recovers coal seams to depths of 2,000 feet or more. Very often, the coal is further processed after mining to remove impurities and upgrade quality before shipment to customers by conveyor belt, truck, rail, barge or ocean vessel.

Thus, as a plentiful, economic and secure energy resource, coal is and should remain a cornerstone of our national energy supply for generations to come.

D. Industry Structure. The coal industry is one of extremes, both very large and very small. There are literally thousands of individual mines (3,800 in 1989) ranging in size from a surface mine in Wyoming which produces nearly 30 million tons per year to mines that extract only a few thousand tons annually. The fifty largest mines in the country, accounting for nearly one-third of the nation's output, each produce at least 3 million tons annually, and yet the average size of a U.S. coal mine in 1988 was only 265,000 tons. Truly, the U.S. coal industry is one of contrasts.

Ownership within the industry is equally diverse, ranging from individual entrepreneurs to some of the nation's largest corporations. Of the top twenty coal companies, representing over 50 percent of the coal industry output (Table 1), all are subsidiaries or affiliates of other energy, mining or diversified interests.

MAJOR U.S. COAL PRODUCERS, 1989

(Million Short Tons)

	Tonnage	Pct. Of Total Production
1. **Peabody Holding Group** (Hanson Industries)	86.7	8.9
2. **Consolidation Coal Company** (E.I. DuPont de Nemours)	53.5	5.5
3. **AMAX Coal Industries Inc.** (AMAX Inc.)	38.4	3.9
4. **ARCO Coal Company** (Atlantic Richfield Company)	31.1	3.2
5. **Texas Utilities Mining Company** (Texas Utilities Company)	29.9	3.1
6. **Exxon Coal and Minerals Company** (Exxon Corporation)	28.1	2.9
7. **Shell Mining Company** (Royal Dutch Shell)	25.5	2.6
8. **NERCO** (Pacific Corp)	24.5	2.5
9. **Sun Coal Company** (Sun Company, Inc.)	22.8	2.3
10. **North America Coal Corporation** (NAACO, Inc.)	22.5	2.3
11. **Western Energy Company** (Montana Power Company)	21.8	2.2
12. **Island Creek Corporation** (Occidental Petroleum Corporation)	19.6	2.0
13. **Arch Mineral Corporation** (Ashland Oil; Hunt Petroleum Inc.; Hunt Industries)	18.9	1.9
14. **Kerr-McGee Coal Corporation** (Kerr-McGee Corporation)	17.6	1.8
15. **A.T. Massey Coal Co.'s Sub.** (Fluor Corporation)	16.9	1.7
16. **Kiewit Mining Group** (Peter Kiewit Sons Co.)	15.9	1.6
17. **BHP-Utah Minerals** (Broken Hill Proprietary Co., Inc.)	15.2	1.6
18. **Pittsburg and Midway** (Chevron Corporation)	15.1	1.5
19. **Cyprus Coal Company** (Cyprus Mineral Corporation)	14.2	1.5
20. **Coastal Coal** (Coastal Corporation)	13.4	1.4

(TABLE 1)

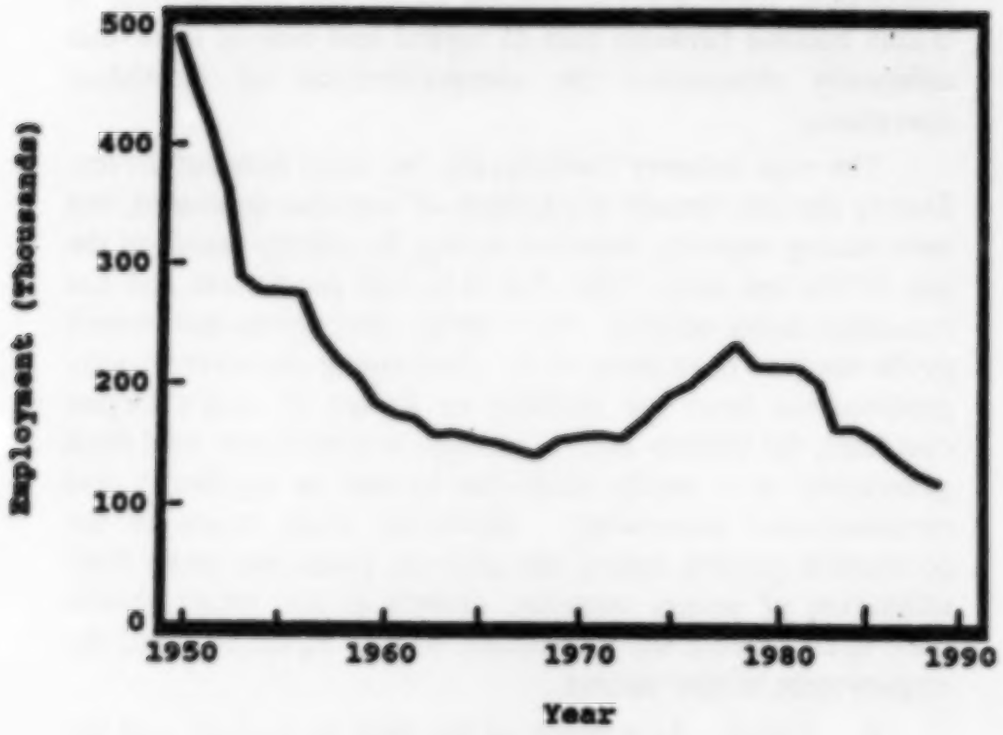
Coal mining today can be both capital and labor intensive. Major mining systems and individual pieces of equipment can cost millions of dollars each but the labor component, particularly at smaller mines, can also be high. It is this balance between cost of capital and cost of labor that ultimately determines the competitiveness of individual operations.

The coal industry traditionally has been demand driven. During the last decade production of coal has increased, but new mining capacity installed during the energy boom of the late 1970s and early 1980s has outpaced production and has remained under utilized. As a result, coal prices and overall profit margins have been weak. Prolonging this overcapacity problem has been the inability or failure of coal's largest customer, the electric utility industry, to install new coal fired generation on a timely basis due in part to regulatory and environmental uncertainty. However, while much of the production growth during the past ten years has come from utilization of excess capacity, growth in the future should once again require the installation of new equipment and the employment of new miners.

E. Labor. As a result of the shift in markets and the rapid mechanization of U.S. mines during the 1950s and 1960s, coal mine employment declined 75 percent during this period from a high of 488,000 in 1950 to 130,000 by 1969. (Figure 2) This downward tend was reversed during the 1970s due to increased production but mainly in response to new federal and state legislation regulating coal mine safety and mined land reclamation.

However, beginning in the late 1970s and throughout the 1980s, the downward trend has resumed and coal mine employment today is at a post-war low despite record levels of production.

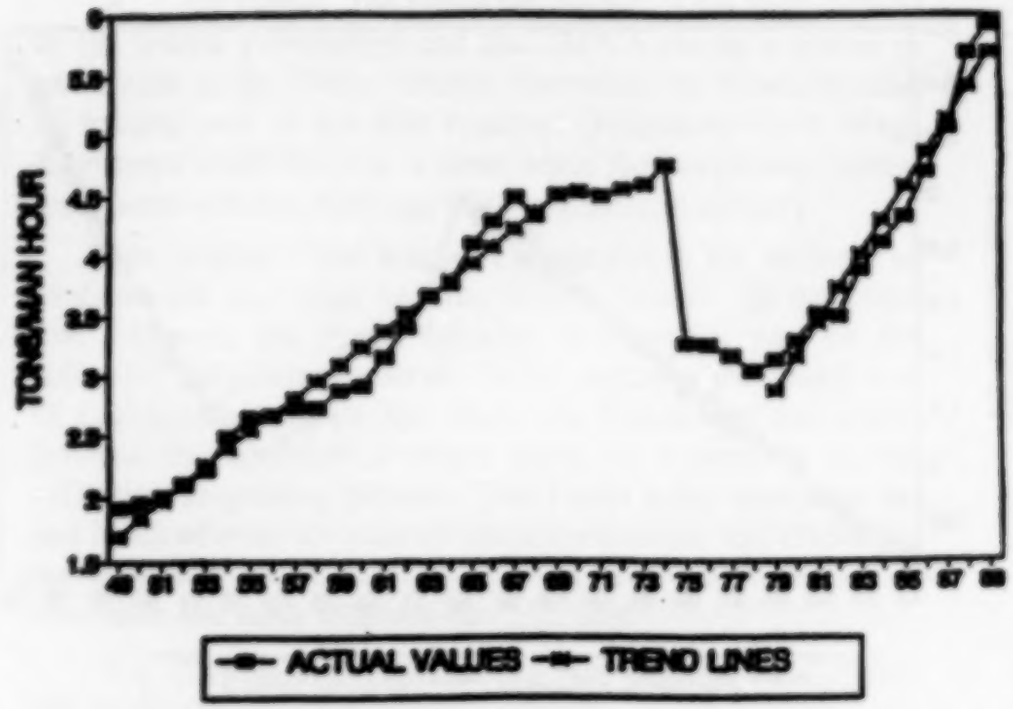
U.S. Coal Mine Employment
1950 – 1988



(FIGURE 2)

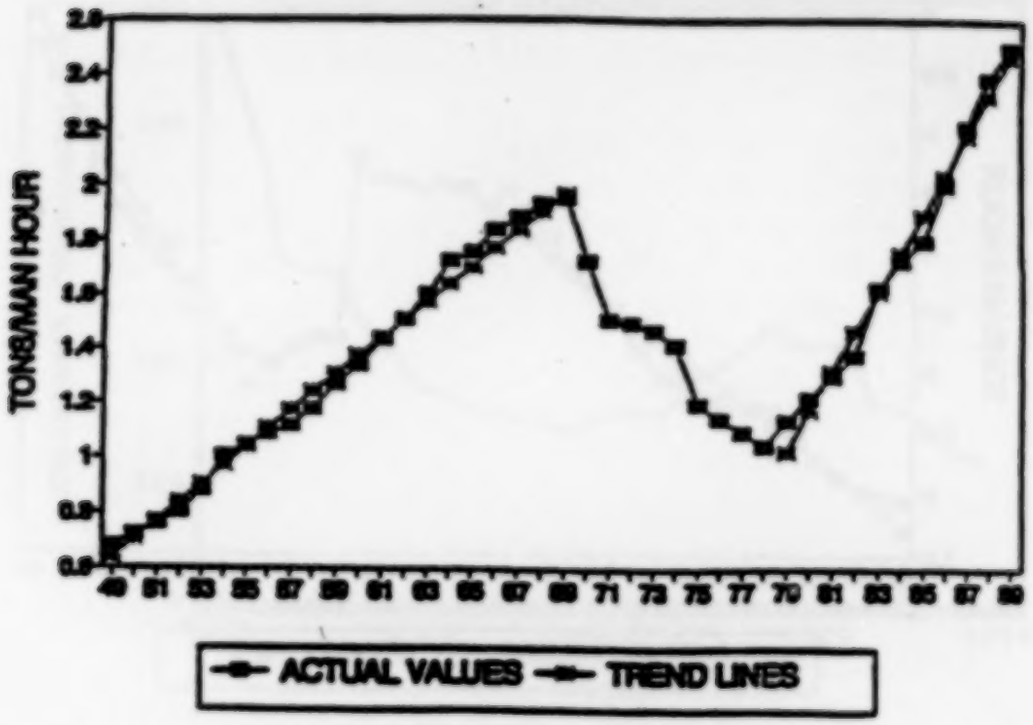
From 1950 through 1969, coal mine productivity grew steadily but then declined during the 1970s as a result of the new federal and state laws and regulations. However, during the 1980s that trend has been reversed and industry-wide productivity has increased at a rate of over 8 percent per year during the past decade. (FIGURES 3 & 4)

PRODUCTIVITY IN SURFACE MINES
(ALL EMPLOYEES)



(FIGURE 3)

PRODUCTIVITY IN DEEP MINES
(ALL EMPLOYEES)



(FIGURE 4)

As mining operations and equipment have become more technical and complex, there has been a corresponding change in the work force. Today's miner is likely to be older, better educated, better paid and has about ten years' experience with the same company. In addition, women miners are common today. A coal miner's average annual income is about $35,000 and can be considerably higher with normal overtime and bonuses. Health and welfare benefits rank among the best in U.S. industry. In short, coal miners today are among America's most highly trained, skilled and best paid industrial workers.

CHAPTER TWO

HISTORY OF THE FUNDS[1]

A. The Funds. The Funds are unique. They were created by the federal government and the UMWA during a period of labor strife in the 1940s. Shortly thereafter, the Funds became an integral part of the first National Bituminous Coal Wage Agreement (NBCWA) at a time when the bargaining parties were faced with the challenge of saving the coal industry.

The original Fund was an experiment in the delivery of medical care and other benefits to coal miners. In the years that followed, the Funds became an essential part of the collective bargaining process. More recently, the rising cost of health care benefits has made the Funds and the health benefits they provide a major point of contention in the collective bargaining process. The Funds today represent the end result of over 40 years of historic evolution and efforts by the parties to fit a medical care system into a changing economic and labor relations environment.

B. Historical Development. The history of the Funds can be divided into five distinct periods:

- The period of establishment and its historical underpinnings, which saw two factors, the Union's desire for improved medical care for coal miners and labor-management strife, come together in 1946 to establish the Fund. The Fund's administration was fraught with problems and disagreements between the Union and Operator Trustees.

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[1] The material on the History of the Health Care Benefits in the Bituminous Coal Industry was prepared and presented to the Coal Commission by Richard L. Trumka, International President of the United Mine Workers of America, and Joseph P. Brennan, President of the Bituminous Coal Operators' Association, Inc. Some Commission members do not believe that the government is responsible for the Funds' present financial crisis or that it is necessary for the government to be involved in resolving the present crisis.

- The period of development, stretching from 1950 to 1960, which saw the growth of the Funds and its medical care delivery philosophy and infra-structure that in many ways continues to dominate much of their operations.
- The period of retrenchment, during the decade of the 1960s, as economic reality came in conflict with institutional goals. During this period, many of the major initiatives of the earlier years were discarded, eligibility rules were scaled back, and the Fund faced the possibility that its historic mission might not be achieved.
- The period of transition ran roughly through the 1970s. Employer involvement increased. The law demanded fundamental change, especially as it related to pensions; change that came to dominate the attention of the bargaining parties for much of the decade. The Funds moved from being the provider of medical care for all miners to essentially a program for certain retirees.
- The period of crisis covers the 1980s to the present. During the 1980s, the Pension Funds flourished, but the medical care program became increasingly contentious. During this same period, the contribution base declined even though national coal production increased substantially. In the 1980s, medical care costs also rose rapidly, even though cost containment was a major objective of the parties. The net result is that the Health Benefit Funds are now facing a financial crisis.

Four common factors run through the history of the UMWA Funds. Each of them separately and together have contributed to the evolution of the Funds. These factors are (1) government involvement; (2) the collective bargaining process; (3) the medical care delivery system; and (4) the industry.

1. Period of Establishment. The period of establishment covers the system of medical benefits in place before the Fund and the efforts made by the Union to establish it that culminated in the historic Krug-Lewis Agreement.

a. Medical Care Delivery System. Prior to the creation of the UMWA Welfare and Retirement Funds, medical care in coal field communities consisted of a prepaid system based on deductions from the miners' paychecks. Under this system the coal company deducted money from wages and hired doctors to provide medical services to the miners. In many cases this was necessary because the isolated, rural areas where coal was produced did not attract medical professionals and only the lure of a guaranteed income could induce doctors to set up practice in coal mining communities. Over time, the company doctor system developed in ways that the miners felt were not in their best interests.

Because of nationwide concern about health care matters during the Great Depression, President Roosevelt in 1935 appointed an Inter-departmental Committee to Coordinate Health and Welfare Activities. He named as chairman of the committee Josephine Roche, who later became the Neutral Trustee and Executive Director of the Fund. One of the major activities of the committee was to convene a National Health Conference, at which Dr. Walter Polakov, Director of the UMWA Department of Engineering, called for the establishment of "group medicine and group hospitalization" in coal mining communities.

Based on Dr. Polakov's presentation, the Union, through the Good Will Fund of Boston and the Twentieth Century Fund of New York, commissioned a report on medical conditions in the coal field communities by the Bureau of Cooperative Medicine. The study concluded that there was a pressing need for medical care reform in the coal fields.

b. Government Involvement and Collective Bargaining. With the end of the Second World War, Union negotiators renewed their efforts for medical care reform. When negotiations opened in 1945, the UMWA proposed a royalty of 10 cents per ton of coal to be paid to the Union to "provide for

its members modern medical and surgical service, hospitalization, insurance, rehabilitation and economic protection." Although this was a new concept in America, a precedent existed in Great Britain where a welfare fund had been created in 1920, financed by royalties on coal production.

The operators rejected the participating royalty. The proposal ultimately was dropped when Secretary of Labor Frances Perkins entered the negotiations. She met with both sides and offered a compromise that did not include a royalty. The Union accepted the Secretary's compromise suggestion and dropped the medical care proposal until the next round of negotiations.

When the National Bituminous Wage Conference convened in 1946, a health and welfare fund for miners was the Union's top priority. The operators again rejected the proposal and the miners walked off the job on April 1, 1946. Negotiations under the auspices of the U. S. Department of Labor continued sporadically through April. On May 10, 1946, President Truman summoned John L. Lewis and Charles O'Neill, chief spokesman for the northern operators, to the White House. The stalemate appeared to break when the White House announced an agreement in principle on a health and welfare fund.

Despite the announcement by the White House, the operators still would not agree to the creation of a fund. Another conference at the White House failed to forge an agreement and the negotiations again collapsed.

Faced with the prospect of a long strike, President Truman issued an Executive Order directing the Secretary of the Interior to take possession of all bituminous coal mines in the United States and to negotiate with the Union "appropriate changes in the terms and conditions of employment." Secretary of the Interior Julius Krug seized the mines the following day and ordered the miners back to work. The miners refused, and negotiations between the UMWA and the federal government continued, first at the Interior Department and then at the White House with President Truman participating in several conferences.

After a week of negotiations, the historic Krug-Lewis agreement was announced and the strike ended. It created a welfare and retirement fund to make payments to miners and their dependents and survivors in cases of sickness, permanent disability, death or retirement, and other welfare purposes determined by the Trustees. The fund was to be managed by three Trustees, one to be appointed by the federal government, one to be appointed by the UMWA, and the third chosen by the other two. Financing for the new fund was to derive from a royalty of 5 cents per ton of coal produced for use or sale.

The Krug-Lewis agreement also created a separate medical and hospital fund to be administered by Trustees appointed by the UMWA. The purpose of the fund was to provide for medical, hospital, and related services for the miners and their dependents.

The Krug-Lewis agreement also committed the federal government to undertake "a comprehensive survey and study of the hospital and medical facilities, medical treatment, sanitary, and housing conditions in coal mining areas." The expressed purpose was to determine what improvements were necessary to bring the coal field communities into conformity with "recognized American standards." It was the first nationwide medical survey of an industry ever conducted by the United States government.

To conduct the study, the Secretary chose Rear Admiral Joel T. Boone of the United States Navy Medical Corps. Federal government medical specialists spent nearly a year in the various coal fields of the nation exploring the medical care system. Their report, "The Medical Survey of the Bituminous Coal Industry," found that, in coal field communities, "provisions for health range from excellent, on a par with America's most progressive communities, to very poor, their tolerance a disgrace to a nation to which the world looks for pattern and guidance." The survey team discovered that "three-fourths of the hospitals are inadequate with regard to one or more of the following: surgical rooms, delivery rooms, labor rooms, nurseries and x-ray facilities." The study

concluded that "the present practice of medicine in the coal fields on a contract basis cannot be supported. They are synonymous with many abuses. They are undesirable and in many instances deplorable."

Thus, the Boone Report not only confirmed earlier reports of conditions in the coal mining communities, but also established a strong federal government interest in correcting long-standing inadequacies in medical care delivery. Perhaps most important, it provided a road map for the newly created UMWA Fund to begin the process of reform.

Shortly after the Boone Report was issued, the mines were returned to their private owners and a new National Bituminous Coal contract was executed. It combined the pension and medical programs and increased the royalties to 10 cents per ton of coal. Thus began a two-year struggle over activation of the pension program. While the level of the pension benefit and various eligibility issues were in dispute, there was also a major disagreement over whether the Fund should be on a pay-as-you-go or a pre-funded basis. After seven months of stalemate, the Neutral Trustee resigned in frustration.

The failure to agree on pensions caused miners to walk out of the mines in March 1948. Recognizing the intractability of the situation, the Speaker of the U. S. House of Representatives, Joseph Martin, asked the Trustees to meet with him on April 10, 1948. At the meeting in the Capitol, Speaker Martin suggested Senator Styles Bridges of New Hampshire as a neutral Trustee. Both Trustees agreed to the Speaker's suggestion. Senator Bridges pointed out the delay of almost two years since the Krug-Lewis agreement. He proposed to set the retirement age at 62 with 20 years of service and retirement subsequent to the Krug-Lewis agreement. By a vote of Lewis and Bridges the resolution was adopted and the deadlock was broken. Thus the Fund pension program was placed on a pay-as-you-go basis.

2. Period of Development. The 1950s saw a period of labor management cooperation and significant changes in the

way coal was mined. During this period the medical program of the Fund was fully developed.

a. Collective Bargaining Process. The development of the current medical care system is directly tied to the relationship between the parties. The 1950 Wage Agreement marked the beginning of a period of cooperation which had as its basic premise, a concordat between the UMWA and the coal industry that the Fund would move forward and operators would be able to mechanize their mines. A long period of relative labor-management peace ensued as both parties recognized that cooperation was essential to the long term viability of the coal industry.

b. Medical Care Delivery System. Ten regional offices were established throughout the coal fields, with the direction to make arrangements with local doctors and hospitals for the provision of "the highest standard of medical service at the lowest possible cost."

One of the first programs initiated by the Fund was a rehabilitation program for severely disabled miners. Under this program, over 1,200 severely disabled miners were rehabilitated. The Fund searched the coal fields to locate the disabled miners and sent them to the finest rehabilitation centers in the United States. At those centers, disabled miners received the best treatment that modern medicine and surgery had to offer, including artificial limbs and extensive physical therapy to teach them how to walk again. After a period of physical restoration, the miners received occupational therapy so they could provide for their families.

The Fund also made great strides in improving overall medical care in coal mining communities, especially in Southern Appalachia. Recognizing the need for modern hospital and clinic facilities in the coal fields, the Fund constructed and operated ten hospitals in Kentucky, West Virginia and Virginia. The hospitals, known as Miners Memorial Hospitals, provided intern and residency programs and training for professional and practical nurses.

c. Government Involvement. Government involvement in the developmental phase of the Funds was evident in their programs. The doctors recruited to administer the medical care program were, for the most part, former officials of the U. S. Public Health Service. The program which they established, both with respect to delivery and scope of coverage, reflected the views of those seeking much greater government involvement and a restructuring of the health care delivery system.

In addition, the Fund was not a qualified trust under the Internal Revenue Code. As a result, Fund income beyond the level of administrative expenses was deemed taxable. Moreover, employer contributions were not deductible. To correct this a special section was inserted in the Internal Revenue Code in 1954 that permitted the deduction of employer contributions to a trust fund established under circumscribed conditions, one of which was government sponsorship.

d. Industry. After World War II, railroads converted to diesel locomotives; the home heating market was all but lost; natural gas pipelines were constructed; and imported oil began to flow into the country, further eroding coal's markets. As a result, the amount of coal produced fell sharply and the number of miners working dropped drastically. In 1945, 383,000 mine workers produced nearly 578 million tons of coal. By 1960, it took only 169,400 miners to produce nearly 416 million tons of coal.

The economic situation caused two interconnected problems for the Fund and the Miners Memorial Hospitals. First, the sharp reduction in coal output caused financial problems as royalty income fell. Second, the loss of over 200,000 miners drastically reduced the potential number of Fund patients to utilize the services of the new hospitals. Thus, the hospitals had to rely on non-Fund beneficiary patients to meet economies of scale, placing them in direct, and often bitter, competition with other hospitals and local medical societies.

3. Period of Retrenchment. By the 1960s, the difficult economics of the coal industry forced the Fund to take actions to meet financial realities.

a. Government Involvement and the Medical Delivery System. The economic decline of the coal industry forced the Fund to sell the hospitals. Again, the federal government was to play an important role. The United Presbyterian Church approached the Fund with an offer to buy the hospitals, but the purchase was contingent on receiving federal funds from the U. S. Department of Commerce. Eventually, with the help of Assistant Secretary of Labor Daniel Patrick Moynihan and the personal involvement of President Kennedy, federal funds were made available and the hospitals were sold. Although they were no longer owned and controlled by the Funds, they continued to serve miners and other residents of the coal field communities and contributed to a significant improvement in overall medical care.

b. Collective Bargaining Process. Collective bargaining in the beginning of this period saw a continuation of the cooperative efforts that began in 1950. The latter part of the decade, however, saw a resumption of tensions at the bargaining table as the industry began to revive.

In the coal fields there had been wildcat strikes as a result of the retrenchment actions by the Trustees, particularly with respect to eligibility for a health card. For example, in 1960, the Trustees ruled that unemployed miners could only have health cards for one year and from 1962 to 1966 health cards were taken from the employees of companies with delinquent contributions. Both health and retirement benefits were paid from a single trust. Economic realities forced the Trustees to make decisions on the level of benefits. Health care benefits were paid first, retirement benefits were paid last and were not guaranteed. If coal production dropped and there was not enough money in the Fund to pay the "target level" retirement benefit, the amount of the retirement benefit was reduced. In slow times money was diverted from the retirement payments to pay for health care benefits.

c. Industry. Employment levels bottomed out at 124,500 working miners in 1969 as compared to the 415,600 in 1950. Toward the latter part of the decade, there was an unrecognized turn in the fortunes of coal because of the increasing demand by the utilities for energy. But such growth was not a straight line projection of the past. Western production was becoming significant, surface mining was growing, and the potential of coal was attracting large sources of capital outside of the traditional coal industry.

d. Government Involvement. Congress and many state legislatures passed laws on prevention, treatment and compensation for Black Lung which would cost billions of dollars. Moreover, the designation of Black Lung as an occupational disease shifted the medical costs connected with the disease from the Fund to the Black Lung Trust or individual employers, although the cost impact would not be felt for years.

Coal mine health and safety concerns led to the passage of the Coal Mine Health and Safety Act of 1969.

4. Period of Transition. The decade of the 1970s was a period of change for the Funds, the coal industry, and the UMWA. It was characterized by the rapid growth of coal mining nationally, significant changes in health, safety and environmental regulations, and the entry into the work force of a new generation of coal miners. In addition, the Employee Retirement Income Security Act of 1974 (ERISA) became law, imposing significant costs and administrative burdens on the Funds.

a. Collective Bargaining Process. After the death of John L. Lewis in 1969, the Funds once again became a central bargaining issue between the parties. Benefit levels, particularly pensions, were looked upon by the new young work force as being low. Employers became more and more aware of the cost implications of the Fund and the role that it would play in future labor-management relations.

From the 1971 negotiations forward, there was heavy involvement by both settlors on all aspects of the Funds'

operation. The parties monitored Fund administration through oversight of the Trustees and in setting benefit levels and eligibility criteria at the bargaining table. There were several reasons for the shift toward more settlor involvement.

First, the total cost of the programs increased as the number of beneficiaries grew and inflation became a constant.

Second, the legal terrain changed dramatically, especially with pensions, creating a permanent obligation where there was previously none. The intervention of the federal judiciary, especially in Boyle v. Blankenship, Kiser v. Huge, etc., 329 F. Supp. 1089 (D.C.C. 1971), aff'd. 511 F.2d 447 (D.C.C. 1975), overruled many of the eligibility and administrative actions by the Trustees and added nearly 19,000 retired miners to the Fund, many of whom spent a considerable amount of their work careers in nonunion mines. In addition, the new group of retired miners brought thousands of dependents eligible for health care with them.

And, third, the dramatic influx of new workers in the early 1970s suggested a review and a revamping of the pension and benefits programs to meet the needs of these younger workers.

In response to these forces, the 1974 Agreement restructured the Fund into four separate Trusts -- two for pre-1976 retirees, the 1950 Pension and 1950 Benefit Plans, and two for post-1975 retirees and the active work force, the 1974 Pension and 1974 Benefit Plans. The new plans also established a negotiated plan of benefits removing Trustee discretion to set benefit levels and eligibility standards.

The enormous overhang of pension liability of the post-ERISA period mandated a close working relationship between the parties. The parties agreed on a rapid funding schedule for the 1950 Pension Plan, a schedule that resulted in full funding of that Plan in 1987. The newly created ongoing liability of the 1974 Plan was to be funded on an hourly contribution basis.

b. Industry. The decade of the 1970s saw a major turn around for the coal industry in terms of production,

employment, and future potential. The impact on the Funds was threefold: first, the new growth potential offered the prospect of financial stability after two decades of stagnation and decline; second, there was an influx of young coal miners with expectations considerably higher than their grandfathers; and, third, a whole generation of miners retired. This occurred at a time when pension and medical care costs began to escalate and contractual pension obligations became fixed by statute.

But the most compelling feature of the period was the decline in the relative national share of NBCWA tonnage. The coal industry was being altered in a major way. New investors came into the coal industry who often were not interested in old established relationships and were unwilling to participate in the Funds. The new mines in the west were highly productive and did not want to subsidize their low productivity competitors. If there was to be a relationship with the UMWA, they wanted it to be outside the national agreement.

In this environment, the NBCWA also came under sharp attack from the signatories, and more and more attention came to be focused on the health and retirement system. One of the mutual responses to this trend by the UMWA and the BCOA was to fund the pensions as rapidly as possible to make them immune from economic trends in the industry. This effort was successful.

c. Medical Care Delivery System. In the 1970s, sharply increasing costs focused concern on the Funds. During the term of the 1974 NBCWA, contributions were reallocated among the various trusts in an effort to maintain the benefit stream. But the Funds fell into serious financial difficulty, leading to the reduction of medical benefits and eventually a total cutoff during the strike at the expiration of the Agreement. This first ever reduction of medical benefits resulted in a massive unauthorized work stoppage during the summer of 1977.

d. Government Involvement. The 1971 negotiations took place during wage and price controls and the agreement

had to be approved by the government. Both sides worked together to win government approval because the 15 percent increase in labor costs exceeded the Government's wage guidelines. The government approved the 15 percent wage increase and the doubling of the contribution rate to 80 cents per ton. However, it did not agree to allow an increase in the price of coal to the consumer to pass through the increase in the contribution rate as agreed by the parties.

5. Period of Crisis. The strains of the 1974 Agreement were carried forward into the 1978 negotiations. The Funds, especially the Benefit Plans, have been a matter of concern to the parties ever since.

a. Collective Bargaining and the Delivery System. Both parties entered the negotiations in 1977 with definite ideas on health care issues. The BCOA proposed individual company health plans and the UMWA wanted a guarantee that health benefits would not be cut in the future. Failure to reach agreement on these and many other issues caused an 111-day contract strike. Once again the federal government was involved; the White House intervened in the dispute and negotiations were conducted in the Secretary of Labor's office.

Under the 1978 agreement the Funds ceased to provide medical benefits to all beneficiaries; responsibility for active miners and for post-1975 retirees shifted to the individual companies as part of a broad agreement that also restored and guaranteed the benefits and introduced the so-called "evergreen clause" or continuing contribution obligation into the Agreement. This clause is currently in litigation. The 1974 Benefit Trust remained as a Fund for retirees whose last employer had gone out of business. The meaning of this eligibility language is in dispute and also is in litigation.

For the Funds' beneficiaries the changes were far more basic. Beneficiaries had freedom of choice in selecting medical care providers, effectively ending the clinic system and participating physicians and hospitals. A new program was established covering acute drug needs.

The Trustees, in addition to their role as administrators, were to act as arbitrators in the company health plans to ensure that active miners and retirees on company plans would receive the same level of benefits as those beneficiaries on the Funds' rolls. This arbitration arrangement has been sanctioned by the Department of Labor since it was put into place in 1979.

The disparity in the levels of productivity between bituminous and sub-bituminous western mines also led to a negotiated agreement between some western coal operators and the UMWA. Under the terms of the Western Coal Wage Agreement of 1978, western coal companies agreed to create company-based health care and retirement funds which provided benefits that were as good as or better than the benefits provided under UMWA Health and Retirement Funds. Retirees in the Funds from those companies became the liability of the western mine operators, who then were relieved from the obligation to make further contributions to the UMWA Health and Retirement Funds.

In the 1980s there has been a struggle for Fund survival. Contractually, the parties have focused on cost and quality control. In 1984, a specific commitment to jointly address costs was written into the agreement. The 1988 Agreement mandated that the Trustees develop and implement an industry wide fee schedule and continue other cost control programs such as: inpatient hospital pre-admission and length of stay reviews; case management and quality of care programs; an aggressive prescription drug program; and other initiatives that result in no loss or reduction of benefits to participants.

b. Industry. Overshadowing the delivery vehicle have been the cost implications and the labor relations impact of the Funds. By the early 1980s NBCWA tonnage had slipped to close to 40 percent of national production, down from the approximately 80 percent levels when the Fund began. Today it has dropped to about 30 percent as the growth of non-NBCWA coal continued throughout the 1980s. Companies withdrew from

BCOA and sought to individualize their bargaining relationship, often in an effort to end their financial obligations to the Funds.

c. Role of Government. As a result of the 1977-78 dispute, President Carter appointed a Presidential Coal Commission to examine the issues that had lead to the bitter strike, including "health, safety and living conditions in the Nation's coal fields." The Commission found that health care indeed had improved in the coal fields. "Conditions since the Boone Report have changed dramatically, largely because of the efforts of the miners and their Union – but also because of contributions by the Federal Government, State and coal companies." And the benefit of the Funds' program was not limited solely to the immediate beneficiaries. The Commission concluded that "both union and non-union miners have gained better health care from the systems developed for the UMWA".

In 1980, the Congress passed the Multi-Employer Pension Plan Amendments Act (MPPAA) to ERISA. The UMWA and the BCOA strongly supported the passage of MPPAA which embodied the concept of withdrawal liability. In the legislation which ultimately passed, there are special sections for the 1950 Pension Plan based upon its unique nature and the circumstances surrounding its inception.

In 1989, Senators Rockefeller, Heinz, Byrd and Specter introduced legislation to stabilize the funding base of the benefit funds. Included in this legislation was authority to transfer the over funded portion of the 1950 Pension Trust to the Benefit Trusts.

The impact of government upon the Funds has not been limited to the executive and legislative branches. Court decisions too have had major impacts, good and bad, upon the Funds and their solvency. Two are illustrative of the problems.

As noted, the court's decision in Blankenship dealt with the issues of alleged mismanagement of the Fund's finances and arbitrary changes to eligibility standards. In Blankenship, Judge Gesell in 1971 ordered the removal of Union and Neutral Trustees and appointment of a new neutral trustee. He also ordered the appointment of an independent financial advisor and

directed that investments be made only in the interest of participants and beneficiaries.

The Royal/Nobel line of cases is still pending before the Courts. Those decisions have added thousands of former miners to the 1974 Benefit Fund with significant financial costs. This matter represents a serious dispute between the parties.

The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

d. Funds Today. Today, the Funds remain a major purchaser of medical care, but the development of health care is now a much broader community effort with the coal industry being only one part of the system.

The Funds should be viewed as a microcosm of the broader national dilemma over retiree health care. This financial crisis not only has the potential to jeopardize necessary health care benefits for retirees, it also threatens the relationship between labor and management in the coal industry. The challenge is to find ways to cope with the present crisis in the medical care delivery system started by a collective bargaining agreement negotiated between the UMWA and the coal operators, with help from the Federal Government, four and one-half decades ago.[2]

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[2] See Appendix 3 for a history of the contribution levels from 1946 to the present.

COVERAGE OF THE FUNDS

A. Coverage. As early as the 1950s the United Mine Workers of America and the major bituminous coal operators negotiated labor contracts that included employer contributions into a jointly administered central health care fund for active and disabled miners, retirees and dependents.

In 1974 the UMWA and the Bituminous Coal Operators' Association (BCOA), representing major coal producers, agreed to the establishment of two separate health benefit funds to be administered by independent trustees. One (the 1950 Benefit Plan) would be a closed fund for miners and dependents who retired prior to 1976, while the second, the 1974 Health Benefit Plan, would cover health care for active and disabled miners, dependents, and those retiring after 1975. Each would be funded by employer contributions at levels established through collective bargaining. Obligations under the 1950 Benefit Plan would continue to be funded on tonnage-based contributions. Obligations under the 1974 Benefit Plan were to be funded on an hours-based formula.

In 1978 the UMWA and BCOA agreed that health care for active miners, future retirees and dependents would become the responsibility of single employers rather than the central funds. The level of benefits would remain the same but the operators would be free to set up individual plans for this coverage. The operators would continue to make contributions to the 1950 Benefit Plan at levels adequate to fund health care coverage for those miners who retired prior to 1976 and would provide individual health benefits for their active miners, their post-1975 retirees and dependents. The 1974 Benefit Plan would be retained for the purpose of providing health care for those retirees and dependents whose last employer was "no longer in business."

Today, the UMWA Health and Retirement Funds are structured as follows:

1. 1950 Pension Plan. The 1950 Pension Plan provides retirement benefits to miners who retired before December 31, 1975 and to those "who became disabled after May 28, 1946,

and before December 6, 1974, as the result of a mine accident."[3] In addition the 1950 Pension Plan provides retirement benefits to the widows and beneficiaries of retired or disabled UMWA coal miners who are eligible to receive retirement benefits under the 1950 Plan.

2. 1950 Benefit Plan. The 1950 Benefit Plan provides health care benefits for "retired and disabled mine workers who receive pensions from the 1950 Pension Plan."[4] The 1950 Benefit Plan also provides health care benefits to the dependents of retired or disabled mine workers who receive retirement benefits from the 1950 Pension Plan. In addition, the 1950 Benefit Plan "provides health and death benefits to the eligible survivors of retired or disabled UMWA mine workers."[5] In some instances, the 1950 Benefit Plan also provides health care benefits for "disabled mine workers under the age of fifty-five who do not qualify for disability pensions but who will qualify for retirement pensions upon reaching the age of fifty-five."[6] The 1950 Benefit Plan also provides for the payment of death benefits "to eligible surviving dependents of deceased pensioners or to the estates of deceased pensioners who are not survived by eligible dependents."[7]

3. 1974 Pension Plan. The 1974 Pension Plan provides retirement benefits to UMWA coal miners who retire after December 31, 1975. The 1974 Pension Plan also provides retirement benefits to UMWA coal miners "who became disabled after December 5, 1974, as the result of a mine accident."[8] In addition, the 1974 Pension Plan provides retirement benefits to the widows and beneficiaries of retired or

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[3] Summary Plan Description, 1950 Pension Plan and Trust; 1950 Benefit Plan and Trust, United Mine Workers of America Health and Retirement Funds (undated).

[4] Id.

[5] Id.

[6] Id.

[7] Id. at 3.

[8] Summary Plan Description, 1974 Pension Plan and Trust, United Mine Workers of America Health and Retirement Funds (undated).

disabled coal miners who are eligible to receive retirement benefits under the 1974 Plan.

4. 1974 Benefit Plan. The 1974 Benefit Plan provides health care and death benefits only to UMWA coal miners whose companies are no longer in business. The 1974 Benefit Plan also provides health care and death benefits to the dependents and the spouses of such miners.

B. Comparison with Other Plans. A comparison of the health care and retirement benefits received by UMWA members with those received by members of the United Auto Workers (UAW) and the United Steelworkers of America (USWA) reveals similarities and some differences.[9] On the whole, the health care benefits received by UMWA members are far more comprehensive than health care benefits received by UAW and USWA members; nor does the UMWA plan require deduction or coinsurance. However, the retirement benefits received by UMWA members tend to be less than the retirement benefits received by UAW and USWA members. A detailed comparison of the health care benefits available under each plan is set forth in Figure 5.

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[9] The data comparing the health care benefits received by members of the UMWA with the types of health care benefits received by members of the United Auto Workers and members of the United Steel Workers of America was prepared by Micheal Buckner, Research Director at the United Mine Workers of America, and Bruce C. Swan, Administrative Assistant to the Chairman, Bethlehem Steel Corporation.

(FIGURE 5)

UMWA/USWA/UAW

Retiree Health Benefits Comparison

	UMWA	USWA*	UAW
Type of Plan	Comprehensive	Basic/Major Medical	Basic/Catastrophic Medical
Dependent Coverage	Spouse, unmarried children under 22 years of age, parents living in the same household, unmarried grand-children living in the house under age 22, or disabled dependent.	Spouse, unmarried children under 19 years of age (or under 25 years of age if full-time student), or disabled dependant.	Same as USWA, except covered to age 25, if a dependent for tax purposes.
Medical Necessity Language	Yes	Yes	Yes
Deductibles	None	None on basic. Optional Major Medical* $100 individual $200 family	None on basic. Major Medical $100 individual 2 deductibles/family
Copays	Physician Services Only $5.00/visit Prescriptions: $5.00/prescription	None on basic. Major Medical 20%	None on basic. Major $100 individual 2 deductibles/family
Annual Maximum	None	Major Medical: $30,000	None
Annual Out-of-Pocket Cap	$150/family	None	Major Medical: $2,000
Lifetime Maximum	None	Major Medical: $50,000	Major Medical: $50,000
Reinstatement Provisions	N/A	$1,000/calendar year	N/A

* Optional Major Medical program is and optional program and requires retiree contributions.

BENEFITS DESCRIPTION	UMWA	USWA	UAW
Hospital Coverage - Basic			
Managed Care	Hospital Pre-certification Concurrent Review Discharge Planning Select Surgeon Program Physician UR Prescription Drug UR Catastrophic Case Management	Yes. Pre-certification required for the following: Hospitals, including rehab facilities; Skilled Nursing or Extended Care facilities; Psychiatric Care (Inpatient and Outpatient) Home Health Care Emergency Admissions to be certified within 48 hours	None
Non-Compliance Penalty	N/A	$100.00	N/A
INPATIENT			
Inpatient Days Available	Unlimited	120 days per admission	365 days/hospitalization
Non-participating Hospital Payment	N/A	$25 for the first day $10 thereafter	N/A
Mental/Nervous	Up to 60 days treatment (does not include A&D)	30 Days during any 12-month period	45 days; renewed after 60 days of no confinement
Alcohol and Drug Detox and Rehab	7 calendar days for Detox	Not Covered	45 days; renewed after 60 days of no confinement
Dental Services	Covered, but only for limited oral surgical procedures.	Covered if certified by the physician that hospitalization is medically necessary to safeguard the health of the patient.	Same as USWA
Maternity	Covered – 100% Coverage for newborn child	Covered – 100% Coverage for newborn child limited to the first 10 days. Birthing Centers also covered.	Covered – 100% (Includes routine nursery care of newborns.)

BENEFITS DESCRIPTION	UMWA	USWA	UAW
Hospital Coverage - Basic			
OUTPATIENT			
Alcohol & Drug	Covered	Not Covered	100% of R&C-first 5 visits; patient pays 10% of charge thereafter; $1,000 annual maximum
Dental Services	Same as inpatient dental	Covered if medically necessary to safeguard the health of the patient	Same as USWA
Emergency Accident	Initial treatment within 48 hours of accident	Initial treatment within 48 hours of the accident	Initial treatment within 72 hours of the accident. Unlimited follow-up care.
Emergency Medical	Initial treatment within 48 hours	Not covered (see Optional Major Medical)	Initial treatment within 72 hours
Radiation Therapy	Covered	Covered	Covered
Chemotherapy	Covered	Not covered (see Optional Major Medical)	Covered
Hydrotherapy/ Physiotherapy	Covered	Not Covered (see Optional Major Medical)	Covered
Diagnostic Services	Covered	Covered. Limited to: x-ray examinations with films, ultrasound when used as a substitute for x-rays with films, metabolism testing, radioactive isotope studies, cardiographic and encephalographic examinations.	Covered

BENEFITS DESCRIPTION	UMWA	USWA	UAW
Hospital Coverage - Basic			
OUTPATIENT			
Pre-Admission Testing	Covered	Covered when performed within 5 days of the scheduled admission	Covered
Surgery	Covered	Covered	Covered
ADDITIONAL BENEFITS			
Skilled Nursing Facility	Covered	Not Covered (see Optional Major Medical)	Up to 730 days or two days for every one day of unused hospital care. 100% payment.
Home Health Care Agency	Covered	Not Covered (see Optional Major Medical)	Each 3 days of care used for home care reduced hospital days by one day.
Kidney Dialysis	Covered	Covered in outpatient department	Covered
PHYSICIANS' SERVICES			
In-Hospital Medical Visits	Covered with copays	120	365/730
Surgical Services	Covered	Covered	Covered
Recurrent/Related Surgeries	Covered	Performed in the home, physician's office or outpatient department of a hospital. Maximum payment of $150/calendar year.	Covered

BENEFITS DESCRIPTION	UMWA	USWA	UAW
PHYSICIANS' SERVICES			
Surgical Assistants	Same as USWA	Covered for a licensed physician who actively assists the operating surgeon provided that the need for an assistant is medically appropriate and the hospital does not employ surgical interns, residents or house staff who are utilized for such assistance.	Same as USWA
Second Surgical Opinion Program	None	None	Voluntary
Non-Compliance Penalty	N/A	N/A	None
PHYSICIANS' SERVICES - BASIC			
Anesthesia	Covered	Covered	Covered
Radiation Therapy/ Chemotherapy	Covered Covered provided that it is not experimental	Covered Not covered (see Optional Major Medical)	Covered Same as UMWA
Diagnostic X-Ray and Ultrasound	Covered	$75 maximum payment per calendar year	Covered
Diagnostic Examinations	Covered with copays	$75 maximum payment per calendar year. Limited to the following services: radioactive isotope studies, metabolism testing, cardiographic and encephalographic examinations.	Covered

BENEFITS DESCRIPTION	UMWA	USWA	UAW
PHYSICIANS' SERVICES - Basic			
Concurrent Care	Same as USWA	Medical/Surgical care covered when medically necessary and rendered by different physicians in different specialties	Same as USWA
Emergency Accident	Within 48 hours after accident	Within 48 hours after the accident; unlimited follow-up care	Within 72 hour after the accident. Unlimited follow-up care
Emergency Medical	Within 48 hours of the onset of the medical emergency	Not covered (see Optional Major Medical)	Same as Emergency Accident
Skilled Nursing Facility	Covered	Not covered (see Optional Major Medical)	2 Visits in a 7-day period
Home Health Care	Covered	Not covered (see Optional Major Medical)	Not covered

BENEFITS DESCRIPTION	UMWA	USWA*	UAW
MAJOR MEDICAL			
Ambulance	Covered (also includes coverage for other transportation)	Covered	Covered under basic plan
Blood	Covered	Blood, blood plasma in excess of 3 pints and transfusions	Not covered
Chemotherapy	Covered	Covered	Covered
Chiropractic Care	Not Covered	Not Covered	Not Covered
Consultations	Covered w/copays	Covered	Covered under basic plan
Diagnostic X-Ray and Lab	Covered	Covered amounts exceeding the diagnostic maximums under Basic Blue Shield	Covered under basic plan
Durable Medical Equipment	Covered	Covered	Covered under basic plan
Emergency Medical	Covered	Covered	Covered under basic plan
Eyeglasses/Contact Lenses	One pair following cataract surgery for the prescription and fitting	One pair following cataract surgery for the prescription and fitting	One pair following cataract surgery for the prescription and fitting
Hearing Aids	Same as USWA (also covers necessary repairs and maintenance)	Covered including the examination for prescription and fitting	Covered separately-includes examination
Home and Office Visits	Covered w/copays	Covered	Covered

* Optional Major Medical program is an optional program and requires retiree contributions.

BENEFITS DESCRIPTION	UMWA	USWA*	UAW
MAJOR MEDICAL			
Home Health Care Agency	Covered under Basic	Covered – 100 visits per calendar year	Covered under Basic
Hydrotherapy/ Physiotherapy	Covered under Basic	Covered	Covered under Basic
Immunizations	Covered	Covered except for travel	Not covered
Mental/Nervous	Covered (see basic section)	$1,500 maximum payment per calendar year. Psychologists services payable only for psychological testing	Not covered
Physical Therapy	Covered	Covered	Covered under basic plan
Prescription Drugs	Covered w/copays	Covered – includes 90% reimbursement for Generics	Participating provider-100% less $5.00 copay
Skilled Nursing Facility	Covered under Basic	Covered	Covered under Basic
Private Room	Covered when medically necessary	Covered when medically necessary	Covered under basic plan
Prosthetics	Covered. Replacements covered when medically necessary	Covered. Replacements covered when medically necessary	Covered under basic plan
Oxygen & Administration	Covered	Covered	Covered

* Optional Major Medical program is an optional program and requires retiree contributions.

BENEFITS DESCRIPTION	UMWA	USWA*	UAW
MAJOR MEDICAL			
R.N.'s	Covered in a SNF or patient's home through Home Health Care Agency	Covered	Covered
L.P.N.	Covered in a SNF or patient's home through Home Health Care Agency	In hospital when required; out of hospital when required. Services in excess of 240 hours paid at 50%	Covered
VISION CARE	Applicable to active and retired employee and their eligible dependents. Fee schedule with frequency limitation every 2 years	Not covered	Applicable active employees, retirees and their eligible dependents. Fee schedule with frequency limitation every 2 years.

Benefit	Actual Charge Up to Maximum Amount
Visual exam	$20
Per lens -	
Single vision	$10
Bifocal	$15
Trifocal	$20
Lenticular	$25
Contact	$15
Frames	$14

Benefit	Actual Charge Up to Maximum Amount
Visual exam	
Ophthalmologist	$40.60
Optometrist	$34.00
Per lens -	
Single vision	$19.50
Bifocal	$26.75
Trifocal	$34.00
Lenticular	$41.30
Contact	$26.75
Frames	$25.60

The chart references the current UAW health care package. In recently concluded rounds of collective bargaining, the health care package has been changed for both GM and Ford workers.

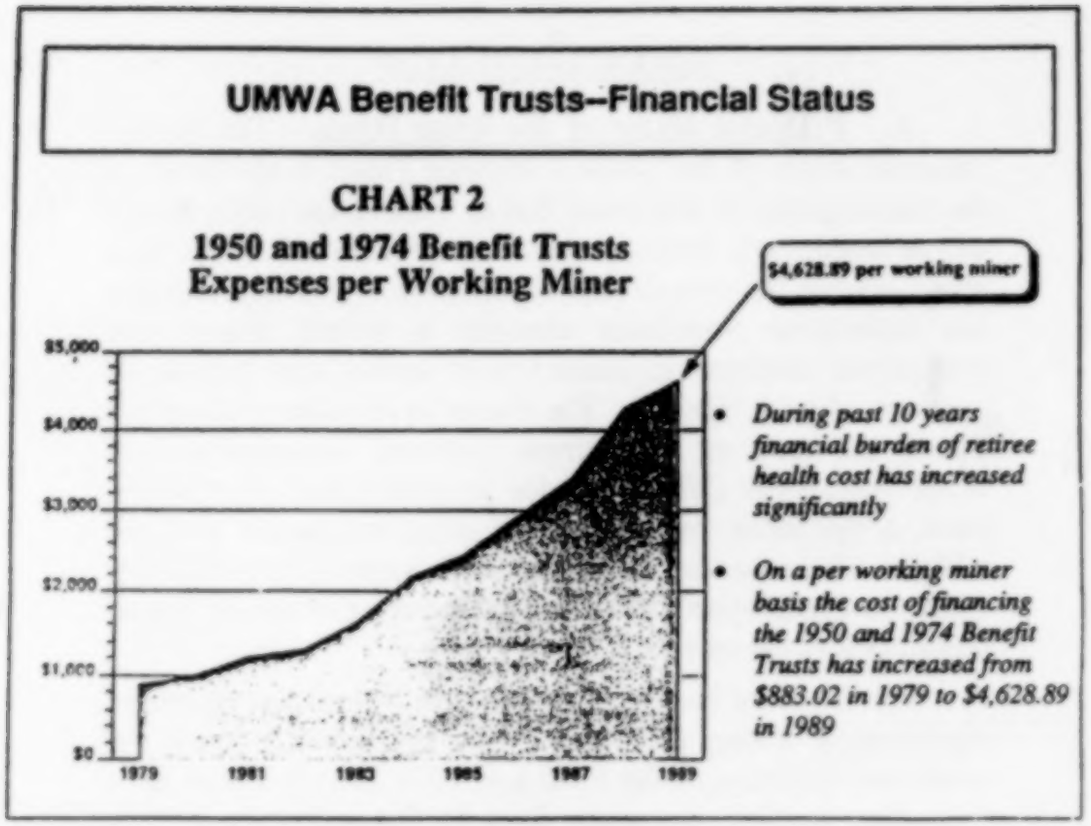
* Optional Major Medical program is an optional program and requires retiree contributions.

CHAPTER FOUR

FINANCIAL STATUS

A. Financial Status of the Trust Funds. The current financial status of the UMWA Benefit Trusts is the result of the convergence of numerous forces both in the coal industry and in health care. Medical care inflation in the U.S. has been about double the overall rate of inflation. The coal industry has undergone significant changes in recent years, with precipitous declines in employment levels and substantial numbers of mine closings. The Funds have suffered shortfalls during the term of the current National Bituminous Coal Wage Agreement (NBCWA) due to insufficient contribution rates, a declining base of contributing companies and the addition of thousands of court-ordered "orphan" beneficiaries whose last employers are no longer operating or are no longer signatories to the current NBCWA.

The financial burden of retiree health costs has increased significantly during the 1980s. Over the past 10 years, the combined expenses of the 1950 and 1974 Benefit Trusts have more than doubled, increasing from $117.4 million in 1979 to $245.3 million in 1989. The annual cost of financing both health care plans, per-working miner, has increased from about $883 to $4,628. (Figure 6)



(FIGURE 6)

At present, each active miner supports 2.4 Funds' beneficiaries, while 10 years ago each miner supported only 1.6 beneficiaries. In addition, active miners support retirees and widows who receive medical care through single employer insurance plans.

The funding base for both Funds currently is declining faster than the beneficiary population. Over the past 20 years, coal production from mines signatory to the NBCWA contracts and contributing to the Funds has declined, while non-NBCWA mines have increased production. NBCWA mines today represent only about 30 percent of total coal industry production and new and tougher environmental regulations expected to go into effect in the near future pursuant to Clean Air Act amendments aimed at controlling acid rain could diminish the funding base even further.

As of July 31, 1990, both Trust Funds showed a $114.7 million deficit, despite the increased contributions from coal operators.[10]

The Funds have brought legal action against a number of employers that are not currently signatory but were signatory to the prior National Bituminous Coal Wage Agreements, seeking to enforce the obligation of those employers to continue to contribute to the Funds. The Funds also have sued the BCOA to increase the rate of contribution to the Trust in order to effectuate the guarantee of benefits contained in the collective bargaining agreement.

1. 1950 Benefit Fund. Total benefit expenses for the Fund in FY 1989 were $202.4 million. As of December 1989, there were 114,300 total beneficiaries: 31 percent retired miners, 41 percent surviving spouses and 28 percent dependents. About half of the beneficiaries worked for employers who are no longer in operation or no longer making contributions to the Fund, reflecting the significant changes that have occurred in the coal industry in recent decades.

The 1950 Fund is essentially a closed Fund limited to retirees as of December 31, 1975, and their dependents. The total number of beneficiaries has declined about six percent over the last several years. This continuing decline reflects the high mortality rate which for the over 65 age group, is 30 percent higher than the national average for males and 16 percent higher for females. It is estimated that the 1950 Fund could conceivably cease operation about the year 2030 upon the death of the last beneficiary.

Despite the decline in the benefit population and implementation of cost containment measures in 1984 and 1988, the cost of providing health care continues to rise, although at a rate below the national average for medical care inflation, and is projected to do so in the future.

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[10] The Funds contend that the BCOA is required to establish further increases in contributions pursuant to the guarantee clause of the NBCWA of 1988.

In FY 1989, the Fund spent $78.9 million for prescription drugs, $71.6 million for physician services and $39.8 million for hospital services.[11] The net health expenses for the Fund in FY 1989 were as follows: 41.5 percent for drugs; 37.6 percent for doctors and 20.9 percent for hospitals. The relatively large share of prescription drug costs reflects the fact that Medicare does not cover prescription drugs and the 1950 Fund bears the entire cost.

During the five-year period from 1984 to 1989, the Fund's prescription drug expenses increased 79 percent and physician services rose 66 percent. The cost of hospital inpatient care declined by 12 percent due to efforts by the Funds to control costs in this area.

The 1950 Benefit Trust is vulnerable to unexpected economic downturns, strikes or congressional action, such as the recent repeal of Catastrophic Care legislation or the Clean Air Act. In addition, the Fund also is involved in litigation that can affect the financial status of the Fund.

Since 1978, with the establishment of employer health plans, the UMWA Funds have functioned essentially as a Medicare wraparound plan with a prescription drug program. The vast majority of Funds' beneficiaries are Medicare enrollees.

Under a special arrangement with Medicare, beneficiaries are provided "one-stop shopping." The Funds perform administrative services for beneficiaries and pay providers for care. In turn, the Funds receive reimbursement from Medicare, both for the costs of health services and for the overhead costs of administration.

The Funds provide services that would otherwise be provided by a Medicare Part B (physicians services) carrier. They do not, however, reimburse hospitals under Medicare Part A.

Retirees covered under coal companies' plans, although eligible for the same benefits as those covered under the

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[11] These amounts exclude death benefits and administrative costs.

Funds, are not provided "one-stop shopping." Company plan retirees who are Medicare eligible are served by their community Part A and Part B Medicare contractors, with company plans providing wraparound coverage of deductibles and coinsurance.

In late 1989, a dispute existed between the Funds and Medicare as to the appropriate level of reimbursement. Cost reports remained unsettled from FY 1985. Negotiators for the Funds and Health Care Financing Administration (HCFA) addressed reimbursement methodology and the need to shift from reimbursement made on the basis of Funds' cash payments to Funds' accrued obligations to providers.

Cost reports through 1984 had been settled consistently on the basis of average prevailing charge limits used by Medicare carriers. Medicare had proposed that rather than applying prevailing charges to determine the Funds' allowable costs, they planned to use the average amount paid by Medicare carriers. The proposed payment screen would by definition be lower.

During the Commission's deliberations, in late September of 1990, the Funds and Medicare resolved the reimbursement dispute in the context of moving toward a capitated reimbursement arrangement for FY 1991 and the future.

Under the capitation arrangement, the Funds are to be paid a predetermined amount per member per month, and the Funds are to provide Medicare services to beneficiaries. If the Funds' actual costs exceed the capitation amount, the signatory employers will be expected to make up the shortfall. If actual costs are less than the capitation amount, the Funds would retain any Medicare payment in excess of actual costs to offset future costs of the Funds. For each year after FY 1991, the payment rate will be increased by a percentage that is based on the Part B national per capita cost, as determined and published annually. A demonstration project is to evaluate whether a capitated payment arrangement will provide a mutually beneficial cost-effective method of

payment for Medicare-covered services for the Funds' beneficiaries.

The negotiated settlement allows for termination 30 days after mutual agreement to end the program, and permits the Funds to terminate unilaterally on 90 days notice. Upon termination, or failure to enter into a demonstration program, the Funds may reinstate the arrangement in effect at the time of the settlement. Under a reinstated arrangement, allowable costs would be determined by comparing the Funds' average payment with a computed average Medicare reasonable charge for a sample of procedures and localities.

Capitation reimbursement offers better incentives for cost savings and simplified reimbursement methodology. Capitation reimbursement has the advantage of providing prompt and predictable reimbursement to the Funds, enabling them to strike better bargains with providers. Capitation allows Medicare the opportunity to predictably control costs for a defined population of beneficiaries. This arrangement constitutes a form of "carve-out" under the Volume Performance Standards recently enacted by the Congress in order to bring Medicare Part B costs under control.

Medicare Part B spending nationwide has been spiraling out of control. The Funds offer a mechanism for helping to control excessive utilization of physicians' services while protecting beneficiaries. Capitated Medicare payments to the Funds have been structured to strengthen that mechanism.

The Funds also will receive substantial cash payments under the settlement's provisions for a change from a cash to accrual accounting in the Funds' cost reports. This cash may be used only to pay the Funds' backlog of Medicare covered claims.

2. 1974 Benefit Fund. Total expenses for the Fund in FY 1989 were $30.7 million. As of December 1989, there were 12,752 total beneficiaries: 42 percent retired miners and 58 percent widows, spouses and other dependents. All of the beneficiaries of the 1974 Fund are "orphans" who have no

employment relationship with current signatories, but whose last employer has terminated their health benefit coverage.

In the past two years, the Fund's population has more than doubled. The rapid growth reflects the severe contraction of coal industry employment in the 1980s and recent court decisions which have added 61% of the beneficiaries to the Fund. The average age of a beneficiary in the 1974 Benefit Fund is 62 years old.

The 1974 Fund's gross per capita health care expenses have increased 52 percent over the past five years. The amount is still below the national average, as a result of the cost containment measures implemented by the Fund.

In FY 1989, the Fund's total expenses were $30.7 million of which $8.1 million was spent for physician services, $5.3 million for prescription drugs and $4.8 million for hospital care. The net expenses for the Fund are divided as follows: 44.7 percent for physicians, 29.1 percent for drugs and 26.2 percent for hospitals.[12]

During the most recent five-year period, prescription drug expenses increased 87 percent and doctor costs rose 55 percent. The cost of inpatient hospital care declined by 17 percent due to aggressive cost containment measures implemented by the Fund.

A number of financial and legal issues have combined to leave the Fund with net assets of only $1.6 million for FY 1989. Projections for mid-1990 show a deficit of $24.8 million. Expenses exceed $3 million per-month with $7.5 million in retroactive payments required by the Nobel case. Other litigation is also in progress that could further impact the solvency of the Fund. The Funds have brought legal action against a number of employers that are not currently signatory but were signatory to the prior National Bituminous Coal Wage Agreements, seeking to enforce the obligation of those employers to continue to contribute to the Funds. The

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[12] These figures do not include the cost of death benefits, administrative costs and court decisions.

Funds also have sued the BCOA to increase the rate of contribution to the Trust in order to effectuate the guarantee of benefits contained in the collective bargaining agreement.

3. 1950 Pension Fund. As of July 1, 1990, the plan remains fully funded, since the market value of assets exceeds the current liability of accrued benefits. The number of participants, including spouses who become eligible upon the death of their husbands, was 108,750. The number of plan participants, excluding spouses, decreased by 4.7 percent last year.

For the year ending June 30, 1990, the plan had net assets of approximately $1.7 billion. Fund expenses totaled $5.8 million and benefit payments were in excess of $224 million. The plan had an actuarial surplus of about $237 million as of July 1, 1990.

A number of suggestions have been offered pertaining to the use of the surplus. One option is to apply a portion of the surplus to eliminate the current deficit in the 1950 Benefit Fund. Transferring the surplus is not currently allowed by law and would need Congressional approval. If the current pool of beneficiaries expires before the funds are spent, the surplus reverts to the 1974 Pension Fund.

4. 1974 Pension Fund. As of July 1, 1989, the total number of reported plan participants was relatively unchanged, increasing slightly over the year from 217,617 to 217,759. The total number of reported active participants declined last year by 14 percent from 64,647 to 55,348.

As of February 1, 1990, monthly benefits were increased for all categories of beneficiaries. The benefit increases increased the actuarial liability by nearly $168 million.

As of July 1, 1990, the actuarial asset value of the Fund was $3.5 billion. Benefits paid totaled more than $224 million. The difference between the actuarial value of accumulated plan benefits and the net assets available for benefits was almost $108 million.

The basic benefit for a 30-year retiree at age 55 is $491 per month. The final benefit at age 62 for a 30-year retiree is $622 per month. (Figure 7) By comparison the basic monthly benefit for a steelworker ranges from approximately $870 to $1,070 and for an auto worker is $1,500 at age 55 dropping to $795 at age 62.

Comparison of Monthly Pension Benefits
30 Year Retiree
1974 PLAN

	UAW	USWA	UAW
Age 55	$491	$870 / $1,080	$795
Basic Temp to Age 62		$200	$705
Age 62	$622	$870 / $1,080	$795

(FIGURE 7)

B. Projected Costs and Revenues. Consulting actuaries Milliman & Robertson developed possible trends and projected costs and revenues for a 20-year period for the Benefit Funds. Experience data provided by the Funds shows that gross health expense per capita has increased 9.1 percent per year for the 1950 Benefit Trust and 8.4 percent per year for the 1974 Benefit Trust over the past five years. But since an increasing portion of the population is eligible for Medicare each year, actual Funds net per-capita costs are increasing more slowly.

Most experts predict that medical care cost will not continue to escalate indefinitely at the rates of the past decade. However, a moderation of health care cost increases will not affect all segments of the community equally.

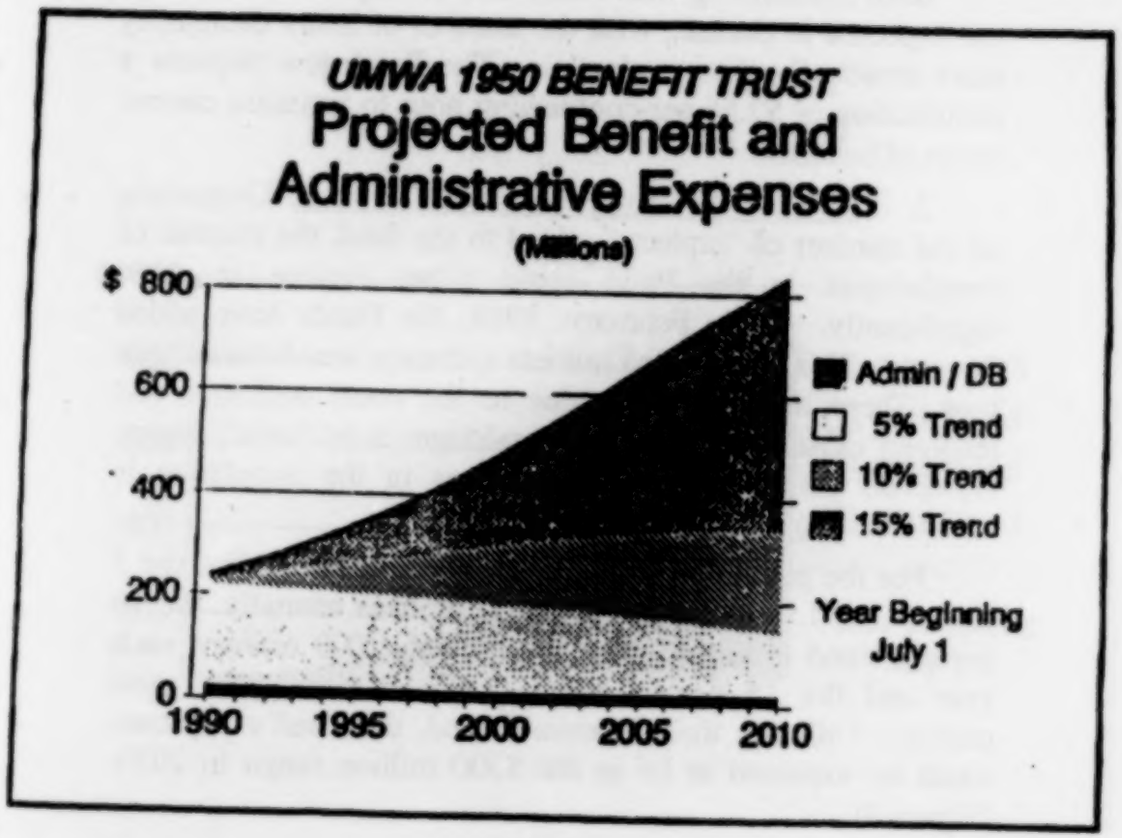
For FY 1990, conforming hours (those worked under the NBCWA) were 88.9 million, signatory hours, including hours worked under conforming and nonconforming agreements, were 91.8 million and the projection is a 3 percent decline per-year. Productivity is currently 3.29 tons per-hour with a 2.5 percent increase projected each year.

The cost projections are based on 3 alternative assumptions regarding trends in costs-per-beneficiary - - 5 percent, 10 percent and 15 percent increases in future years.

About 20 percent of the Funds' current medical costs are for physician services rendered to Medicare beneficiaries. This proportion will grow as more of the Funds' beneficiaries reach age 65. Federal legislation in this area (such as Catastrophic care) could lead to reductions in the overall net per-capita costs for the Funds.

1. 20-Year Projections for 1950 Fund. By the year 2010, the Fund is expected to be predominantly a widow's fund, with less than 3,000 retired miners remaining in the fund. In addition, virtually all beneficiaries will be covered under Medicare. As mentioned earlier, the Fund could expire by the year 2030.

At the end of FY 1990, the current expenses of the Fund are approximately $229 million and are projected to grow, utilizing the 10 percent trend to about $367 million. The 10 percent trend is utilized because in recent years the Fund's expenses have grown at approximately 9 percent a year. (Figure 8)

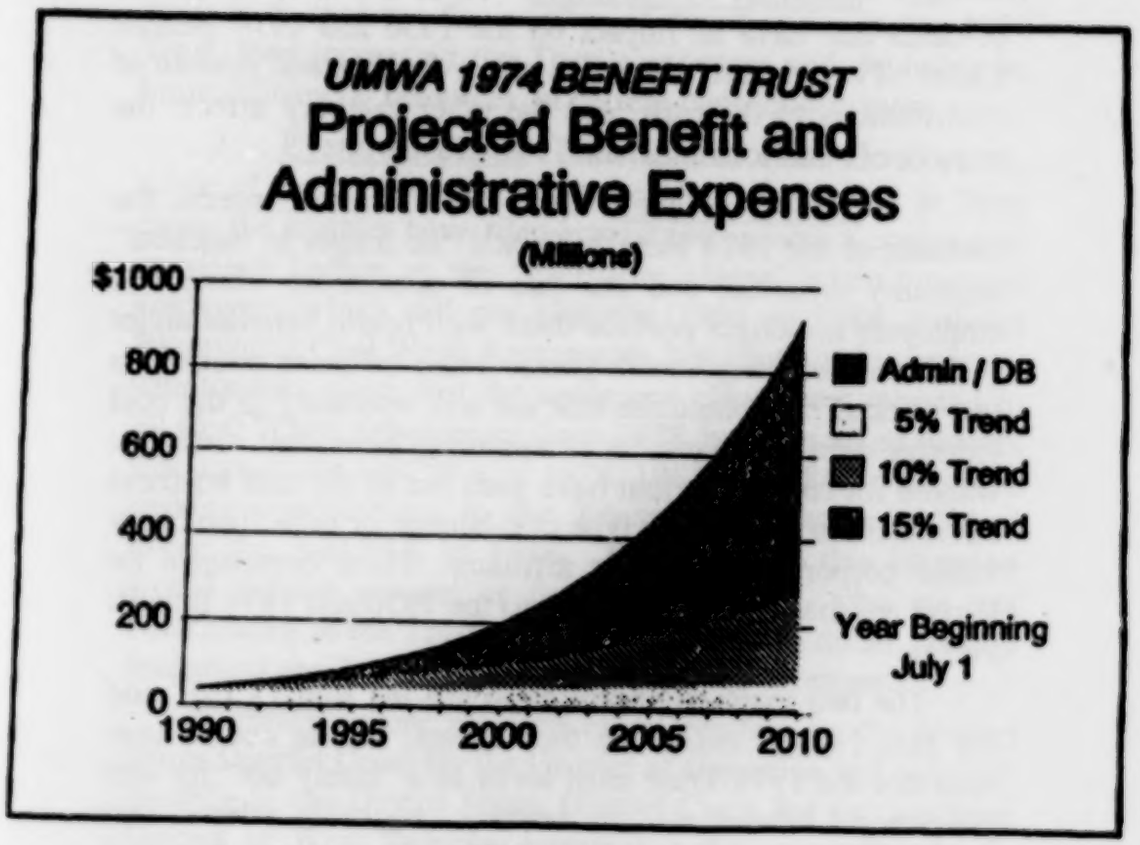


(FIGURE 8)

Both conforming man-hours and tonnage of coal mined are expected to decline, with the number of hours decreasing more drastically than production. The Fund now requires a contribution of $2.55 per-conforming hour to maintain current levels of benefits.

2. 20-Year Projections for the 1974 Fund. Depending on the number of "orphans" added to the fund, the number of beneficiaries in the Fund could either decline or grow significantly. Since February, 1988, the Funds have added more than 1,000 new card holders (primary beneficiaries) per year. These additions were due to the court decisions and resolved most of the pending "no-longer-in-business" issues. However, the rate of future increases in the population is difficult to project.

For the projection of expenses, the actuaries linked the 5 percent trend to the addition of 500 orphans annually, the 10 percent trend is linked to an increase of 1,000 orphans each year and the 15 percent trend is linked with 1,500 extra orphans. Utilizing the 10 percent trend, the Fund's expenses could be expected to be in the $300 million range in 2010. (Figure 9)



(FIGURE 9)

Signatory hours are projected to decline by three percent each year and the Benefit Fund cost per-hour, using the 10 percent trend, is projected to increase substantially to nearly $5 per-hour. On the basis of tonnage mined, the projected cost-per-ton, under the 10 percent trend rises from approximately $.12 per ton to almost $1.

3. 20-Year Projections for the Combined Funds. Currently, the 1950 Benefit Fund is clearly dominant in terms of the number of beneficiaries. But, by the year 2010, assuming continuing additions of orphans as described above, the two Funds will be about equal in population. The main difference is that the 1950 Fund will be predominantly widows. The combined Funds, using the 10 percent growth factor, would have annual expenses topping the $600 million mark.

C. Summary of Litigation. There are three categories of cases that have an impact on the 1950 and 1974 Benefit Trusts . Two of these categories affect the base and amount of contributions to the trust, and the other category affects the number of beneficiaries in the 1974 Trust.

1. Eligibility Cases. This line of cases concerns the meaning of the 1974 Benefit Trust's "no longer in business" eligibility criterion, and the fate of pensioners whose last employers no longer provide them with health benefits under individual company health plans. Some of these pensioners last worked for companies that are still operating in the coal industry on a non-signatory or nonunion basis, and some last worked for companies that have gone out of the coal business but remain in some other type of business, or have financially viable corporate parents or affiliates. These companies no longer are making contributions to the 1950 and 1974 Benefit Funds.

The two main eligibility cases are the Royal Coal[13] and the Max Nobel[14] cases. In these cases, federal courts have held that the 1974 Trust must serve as a "safety net" for any pensioners subsequent to January 1, 1976 whose last employer is no longer signatory to the current National Bituminous Coal Wage Agreement (NBCWA) and whose last employer is not obligated to provide benefits to the pensioner under an individual company health plan. The Nobel case was decided by the United States District Court for the Western District of Pennsylvania in late 1989, and was affirmed without opinion by the Third Circuit Court of Appeals. On September 17, 1990, BCOA filed a petition for certiorari asking the Supreme Court of the United States to review the Nobel case.

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[13] District 29, UMWA v. UMWA 1974 Benefit Plan and Trust, 826 F.2d 280 (4th Cir. 1987), cert. denied, 485 U.S. 935 (1988).

[14] United Mine Workers of America International Union v. Max Nobel, 720 F.Supp. 1169 (W.D. Pa. 1989), aff'd without opinion, 902 F.2d 1558 (3rd Cir. 1990), petition for cert. filed, (Sept. 17, 1990).

The result of these and other closely related eligibility cases is to increase the number of beneficiaries in the 1974 Trust, thus increasing the Trust's expenses and depleting its limited financial resources, at current contribution rates.

2. Evergreen Cases. This line of cases involves the scope of the contribution base to each of the Trusts. In these cases, the trustees have filed lawsuits to enforce a contractual provision known as the "evergreen clause" against several employers which did not sign the 1984 or 1988 National Bituminous Coal Wage Agreements, but continued to operate. The trustees claim that the evergreen clause, incorporated in all Coal Wage Agreements since 1978, requires all employers that signed the NBCWA of 1978, 1981, or 1984, to continue making contributions to the Trusts at the rate established under the NBCWA of 1988. If successful, this litigation would require present or former signatories, who are not contributing to the Trusts at the current rates to do so, thereby increasing the Trusts' contribution base and revenues.

Currently, there are four cases pending in the United States District Court for the District of Columbia and one case pending in the United States District Court for the Southern District of West Virginia, concerning the evergreen clause. The issue in one of the District of Columbia cases is whether former signatories have a current obligation to contribute to the Trusts, even though they are not signatory to the NBCWA of 1988.[15] The other three District of Columbia cases and the West Virginia case concern whether employers that are signatory to the evergreen clause can lawfully negotiate separate agreements with the UMWA that purport to permit those employers to contribute nothing to the Trusts, or to continue at reduced rates or on terms different from the NBCWA.[16]

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[15] United Mine Workers of America 1974 Pension Trust v. A & E Coal Company, (No. 88-1126-TFH).

[16] United Mine Workers of America 1974 Pension Trust v. The Pittston Company, No. 88-0969-TFH; United Mine Workers of America 1950 Benefit Plan and Trust v. Pittsburgh & Midway Coal Mining Co.,

3. Guarantee Cases. There are two cases pending in the District of Columbia that have been brought by the trustees against BCOA to require BCOA to increase the rate at which employers contribute to the Trusts.

One of the cases concerns the contribution rate to the 1950 Benefit Trust,[17] and the other case concerns the contribution rate to the 1974 Benefit Trust.[18] In the "Guarantee Cases" litigation, BCOA acknowledges that it has authority under the so-called guarantee clause of the NBCWA to increase the rate at which employers contribute to the Trusts. BCOA contends, however, that its members and other signatory employers are not obligated to pay a disproportionate share of the Trusts' revenue needs, and that signatory employers should not have to pay for the benefits of financially viable companies who are improperly dumping their retiree health costs into the Trusts. BCOA further contends that if all employers signatory to the evergreen clause were complying with their contractual obligations and making full contributions to the Trusts, and if the trustees were prudently managing the funds, the contribution rates established under the agreement would be sufficient to pay for the benefits of all the Trusts' legitimate beneficiaries.

On June 29, 1990, the U.S. District Court for the District of Columbia issued a preliminary injunction requiring BCOA to increase the contribution rate to the 1974 Benefit Trust so that an additional $2 million per month is paid to the 1974 Benefit Trust on each of September 10, 1990, October 10, 1990, November 10, 1990, and December 10, 1990, unless the BCOA can establish that alternative sources of revenue have

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No. 88-3716-TFH, consolidated with Pierce v. United Mine Workers of America 1950 Benefit Trust, No. 89-2833-TFH; Connors v. Island Creek Corp., No. 87-1210-SSH, consolidated with Connors v. Drummond Coal Co., No. 87-1973-SSH, United Mine Workers of America 1974 Pension Trust v. Rawl Sales & Processing Co., (No. 3:90-0890, S.D.W.Va.).

[17] UMWA 1950 Benefit Plan and Trust v. BCOA, (No. 89-1744-TPJ, D.D.C), appeal docketed, (No. 90-7139, D.C. Cir., Sept. 17, 1990).

[18] UMWA 1974 Benefit Plan and Trust v. BCOA, (No. 90-0674-TPJ, D.D.C).

become available prior to those dates. On August 14, 1990, the court issued a preliminary injunction, later modified on August 16 and September 7, 1990, requiring BCOA to increase the contribution rate to the 1950 Benefit Trust so that an additional $6 million per month will be paid to the 1950 Benefit Trust on each of October 10, 1990, November 10, 1990, December 10, 1990 and January 10, 1991, unless the BCOA can establish that alternative sources of revenue have become available prior to those dates. BCOA has appealed the preliminary injunction in the 1950 Benefit Trust case, and that appeal is pending in the United States Court of Appeals for the District of Columbia Circuit.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

The solution to the health care crisis in the coal industry consists of two parts. The first part deals with liquidating the deficit and assuring the long-term solvency of the Funds. The second part deals with the implementation of cost containment measures to reduce the expense involved in providing health care benefits to retired miners and their families.

In arriving at its findings and recommendations, the Commission considered a number of analytical questions that are critical to resolving the long-term crisis of retiree health care in the coal industry. (See Appendix 1.) Based upon its consideration of these and other questions, the information available, and the time permitted, the Commission arrived at a broad consensus, recognizing that further work will be required and that modifications may occur.

A. CONSENSUS.

First, and most broadly, the members of the Commission believe that the Commission's main objective is to find a long-term solution to the problem of delivering and financing health care in the coal industry. In addition, there is a consensus of the Commission that is, agreement of most of the Commission members, on the following points:

1. Contribution Obligations. Contribution obligations should be statutorily imposed on past signatories, pursuing a test similar to the ERISA "control group" test, possibly reaching back to the signatory class of 1978.

2. Withdrawal Liability. Withdrawal liability should be imposed prospectively to prevent dumping, that is, shifting the liability for health care to employers who have no relationship with the employee.

3. Transfer of Pension Surplus. The surplus in the 1950 Pension Trust should be transferred in one of several

ways to fund the deficits in the 1950 and 1974 Benefit Trusts, as part of an overall financing package.

4. State-of-the-Art Cost Containment and Managed Care. Any plan should use state-of-the-art cost containment and managed care measures as part of an overall package of health care delivery and financing, as described in Section D of this Chapter.

5. Re-enrollment of Beneficiaries. Comprehensive re-enrollment and certification of beneficiaries is appropriate to ensure that benefits are directed only to those entitled to receive them.

6. Long-term Financing. Any residual financing requirement must be limited to the smallest level practical. The contribution obligation that might be imposed on those with no contractual or historic connection to the Funds should be at the lowest practicable level: (1) after those with a contractual or historic connection have contributed; (2) after any pension surplus has been used appropriately, and (3) after managed care and cost containment measures outlined in Section D of this Chapter have been implemented.

7. Flexibility in Determining Dimensions of the Contribution Base. There should be flexibility and further consideration on exactly how any broadened contribution obligation might work. The assessments could be calculated based on hours worked, tons mined, and tons imported. Also, the rate need not be the same for all operators and for all coal. Variations based on BTU content may be appropriate, as well as variation based on past connection with the Funds.

8. "Sunset" Provision on Financing Structure. A "sunset" provision, which would re-evaluate the new delivery system and financing structure, would be appropriate after a period of time.

9. Limited Applicability of Proposed Solutions. These proposed solutions are not permanent solutions for the coal industry; nor are they intended for any other industry.

10. Extension beyond 1993. Any financing package must extend beyond 1993.

In short, the Commission has reached an understanding on a wide range of issues aimed at resolving the crisis of retiree health care in the coal industry. Most important of these are the imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree health care obligations, authority to utilize excess pension assets and the implementation of state-of-the-art managed care and cost containment techniques.

While a broad consensus exists on these points, the Commission did not develop a consensus on the question of who should provide financing for orphan retirees. Many Commissioners believe that the orphans represent an industry-wide problem that should be resolved on an industry-wide basis. Others believe that only current and past signatories should be required to finance orphan health care. This represents the principal substantive disagreement among Commission members.

B. FUNDING

Because of the lack of consensus on the question of who should pay for orphans, the Commission has reviewed an industry-wide funding proposal and an alternative funding proposal. The Commission believes that both proposals, modified as may be appropriate, should be considered, along with any other funding arrangements that may be developed, to resolve the crisis in retiree health care in the coal industry.

1. Industry-Wide Funding Plan

The crisis of retiree health care in the coal industry derives from three related problems. First, some employers have sought to avoid, or are avoiding, their obligations to provide health care benefits to retirees and their families, foisting the cost of providing promised benefits on other employers. Second, an ever-growing population of orphan retirees is being supported by a shrinking group of employers and employees. And third, the cost of providing health care benefits to retirees has increased significantly. These problems must be resolved to obtain a long-term solution to retiree health care in the coal industry. This proposal will achieve that result.

I.

CONGRESS SHOULD AUTHORIZE THE CREATION OF A NEW ENTITY CALLED THE COAL INDUSTRY RETIREE BENEFIT FUND TO PROVIDE HEALTH CARE TO ORPHAN RETIREES.

This Fund, created by statute, would provide health care benefits to orphan retirees whose last employer (using an ERISA control group definition) is "out of business". This would include orphan beneficiaries currently in the UMWA 1950 and 1974 Benefit Funds and future orphans of employers -- whether signatory or non-signatory to a collective bargaining agreement -- that meet the "out of business" test. The Fund would be vested with rights to prevent dumping of obligations. The beneficiaries would receive the level of retiree health care benefits they were entitled to receive at the time of entry. The Fund would be financed by an industry fee which applies to all employers in the coal business, including a fee on imported coal.

II.

A NEW UMWA 1991 BENEFIT FUND SHOULD BE CREATED TO PROVIDE BENEFITS TO RETIREES OF CURRENT AND PAST SIGNATORIES OF THE NBCWA THAT REMAIN IN BUSINESS.

This Fund would provide health care benefits to retirees whose last employer (using an ERISA control group definition) remains in business. This would include beneficiaries of the 1950 and 1974 Benefit Funds whose last employer is signatory to the current NBCWA or was signatory to the NBCWA of 1978, 1981, or 1984. Congress would impose a statutory obligation on such employers to finance the cost of health care for its retirees who are placed in the 1991 Fund. Each employer will be required to pay a fair share into the Fund to provide benefits to its beneficiaries. Beneficiaries of the 1991 Fund will receive the same health care benefits they receive in the 1950 or 1974 Funds. To

create greater purchasing power and economies of scale, employers may opt to provide benefits for active employees and individual company retirees under the 1974 Pension Plan through the 1991 Benefit Fund, upon proper payment to the Fund.

III.

CONGRESS SHOULD AUTHORIZE THE SETTLORS TO UTILIZE THE EXCESS ASSETS OF THE UMWA 1950 PENSION PLAN TO REDUCE EXISTING DEFICITS IN THE BENEFIT PLANS.

Historically, the UMWA Pension and Benefit Trusts have been considered a single entity for a number of purposes, including payments. There has been a "reallocation" option in the agreement since 1974 giving BCOA the right to divert contributions from the pension plan to the benefit plan when necessary. BCOA has, over the years, either on its own or at the request of the UMWA, exercised this option many times, most recently immediately prior to the expiration of the 1984 NBCWA.

The 1950 Pension Trust is over funded by approximately $237 million. The obligations are covered by a dedicated bond portfolio which virtually guarantees the payment of benefits even in the event that there is no further signatory employment. Congress should authorize the settlors to utilize the excess pension assets to reduce the existing deficits in the 1950 and 1974 Benefit Funds.

IV.

CONGRESS SHOULD PROHIBIT THE DUMPING OF RETIREE HEALTH CARE OBLIGATIONS SO LONG AS THE EMPLOYER REMAINS IN BUSINESS AND HAS ASSETS TO PAY FOR SUCH OBLIGATIONS.

The ability of an employer to renege on commitments to its retirees and dump liability on the Funds disrupts any effective long range solution. Dumping liability is fatal to any multi-

employer fund as it creates a clear incentive for employers to withdraw as quickly as possible. This disruptive potential is recognized clearly in the 1980 Multi-employer Pension Plan Amendments Act, and action under that statute has served to stabilize most pension funds including the two established under the NBCWA.

Unfortunately, there is no comparable anti-dumping structure in the health care area. The parties imposed substantial withdrawal liability on current signatories to the 1988 Agreement. However, thousands of beneficiaries whose last employers are non-signatory are a substantial burden on the Fund. More than half of current beneficiaries of the 1974 Trust are former employees or widows of companies still in the coal business or in other business ventures. The Commission believes that this situation is intolerable and must be stopped.

V.

CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1978 AND ANY SUCCESSOR AGREEMENT.

Throughout our deliberations, the responsibility of past signatories was a major concern. This subject has been a part of the collective bargaining dilemma that led to the founding of the Commission, is the topic of current litigation and provides an incentive for employers to leave the multi-employer plan.

This, when combined with the anti-dumping recommendation, is aimed at the stabilization of the contribution base and the prevention of a "last man's" club. The "evergreen" obligation has been a part of the agreement between the parties since 1978 and was designed to prevent massive withdrawals from the Funds. Because long and counterproductive delays can be expected in attempts to enforce this obligation through litigation, Congress should

codify the continuing obligation to contribute clause to which current and former signatories agreed.

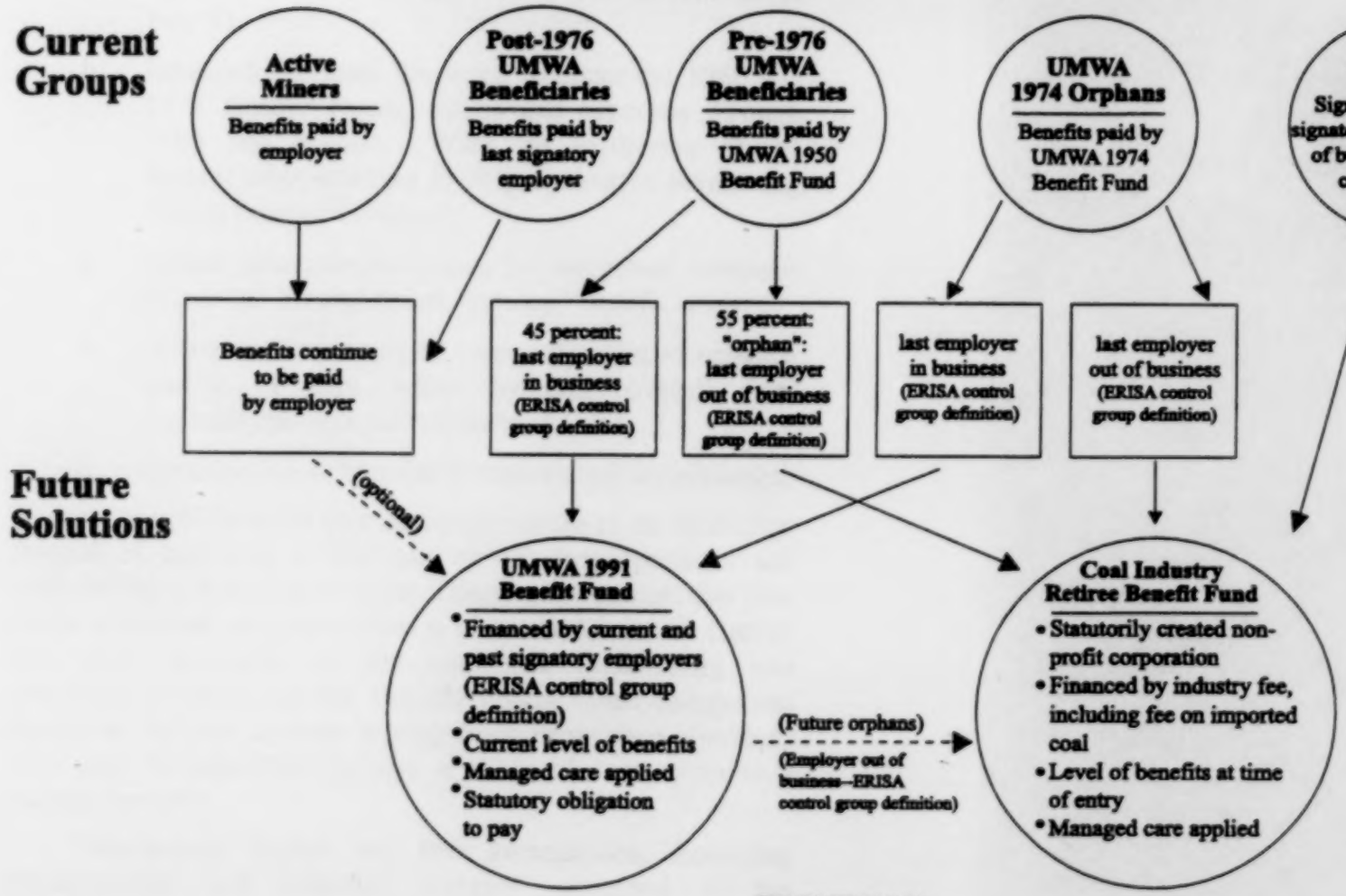
VI.

STATE-OF-THE-ART MANAGED CARE AND COST CONTAINMENT TECHNIQUES SHOULD BE IMPLEMENTED AS PART OF AN OVERALL SOLUTION TO THE RETIREE HEALTH CARE CRISIS.

The Commission discussed ways to improve the quality of health care and, at the same time, reduce the cost of health care. Proper use of managed care and cost containment can achieve these objectives without the loss or reduction of benefits. Such techniques should be implemented in both of the newly created funds. (Figure 10)

INDUSTRY-WIDE FUNDING PLAN

Coal Industry Retiree Health Benefits



(FIGURE 10)

2. ALTERNATIVE FUNDING PLAN

An alternative approach to the financing problem exists. It seeks objectives very similar to those of the industry-wide proposal. This approach has a different funding mechanism than the industry-wide proposal for making retiree health care for coal miners financially secure.

Specifically, any plan should meet the following needs:

a. Eliminate the current deficit of $83 million as of July 31, 1990;

b. Establish adequate financing to cover the 1950 and 1974 Benefit Funds claims and expenses through 1995 and beyond. With the expiration of the present labor contract in1993, collective bargaining should become involved;

c. Ensure adequate provisions for additional revenues to provide for any future "orphan" beneficiaries;

d. Utilize current managed care techniques to enhance quality of care while reducing overall fund expenditures on a per capita basis; and,

e. Continue health benefits to retirees and beneficiaries.

The major difference in this approach relates to its financing. Instead of imposing a new tax on all coal operators and establishing a new agency of the federal government, this plan seeks additional revenues from a broadened base of current and past signatories to the contracts, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

Summarized below are the assumptions, financing arrangements and potential margins contained in the alternative financing proposal.

1. Assumptions

- Actual experience under the 1950 and 1974 Benefit Funds will be consistent with 10% trend projections, which includes assumption of 1,000 new orphans, annually, under the 1974 Fund. (See Margins below.)
- Actual experience under the 1950 and 1974 Pension Funds will be consistent with current actuarial assumptions.
- Managed care recommendations will be adopted as of January 1, 1991.
- Medicare screens for physicians will be adopted as of January 1, 1991.
- Current beneficiaries will be subject to re-enrollment during 1991.
- Legislation will be enacted prohibiting future "dumping" and providing for pension-type withdrawal liability provisions.
- Legislation will be enacted permitting transfer of surplus assets from the 1950 Pension Fund to the 1950 and 1974 Benefit Funds.
- Legislation will be enacted requiring past signatories to contribute to Benefit Funds on an equitable basis.

2. Existing Deficit. The deficit under the 1950 and 1974 Benefit Funds as of July 31, 1990 is about $83 million, after adjusting for the recent court injunctions and the Medicare capitation agreement. The projected deficit as of January 1, 1991 is about $115 million. This will be eliminated by a transfer of $115 million from the 1950 Pension Fund.

3. Financing For Calendar Years 1991 and 1992

a. The current hourly contribution rate of $2.17 for the 1950 Fund will be indexed by the Consumer Price Index (CPI) from April 1, 1989 to January 1, 1991 and to January 1, 1992, respectively.

The 8-cent hourly contribution rate for the 1974 Fund will be increased to 10-cents effective January 1, 1991 and 12-cents effective January 1, 1992.

b. Based on the above financing, the Funds will be short about $70 million each year. This will be provided for as follows:

- A "reachback" to former signatories - this would result in revenues of about $30 million per year.(Revenues are somewhat uncertain as former signatories could object, claiming they bargained out of the agreement in good faith.)
- An estimated $10 million reduction in benefit payments from the adoption of Medicare screens for physicians.
- The balance is provided for by a per tonnage charge on signatory coal of 10 to 12-cents or the balance is provided for by an annual transfer of $30 million from the 1950 Pension Fund.

4. Financing For Calendar Years 1992 through 1995

a. The 1992 hourly contribution rates would be further indexed, by CPI, to each January 1 of 1993, 1994 and 1995.

b. The estimated shortfall for each of these calendar years is about $100 million. This will be provided for as follows:

- The "reachback" will continue to provide about $30 million.
- The savings from Medicare screens will continue at about $10 million.

- The remainder of the pension surplus (about $160 million as of January 1, 1993) will provide about $55 million per year.*
- The balance of the required $100 million will come from a per tonnage charge on signatory coal of about 2-cents.*

5. Possible Margins

- No financial recognition of potential savings from the adoption of managed care provisions. These could result in savings of $10 million per year increasing with inflation.
- If there are no new "orphans" to the 1974 Fund (rather than 1,000 assumed in original projections) then there will be additional surplus of $8 million on January 1, 1993 and $45 million on January 1, 1996.
- If the court-ordered "orphans" were returned to their former employers then there could be additional surplus of up to $90 million on January 1, 1996.
- Actual savings from adoption of Medicare screens could be 5% to 6% rather than assumed 4%. Also $10 million will gradually increase with inflation up to about $12 to $15 million on January 1, 1996.

6. Net Effects

If actual experience is consistent with that assumed, including the indexing of employer contributions and the adoption of managed care

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* If $30 million pension surplus is used in years 1991 and 1992, then only $30 million a year will be available for years 1993 through 1995. Hence, per tonnage charge would be about 10 cents rather than 2-cents.

provisions, then the total additional surplus on January 1, 1996 could amount to $125-$175 million.

7. Other Possible Changes

- Increase benefits for 1950 retirees by 3% on January 1, 1993. This will cost about $40 to $45 million and could be provided for from indicated margins.
- Increase the $5 co-payments for physicians' services and prescription drugs to $5.25 on January 1, 1991 and by 5% thereafter, with appropriate adjustments to annual maximums.

C. COST CONTAINMENT MEASURES.

The Coal Commission believes that cost containment represents a promising approach for reducing the overall cost of providing health care to UMWA retirees and their dependents.

The approach described preserves freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. The Funds, with the backing of the UMWA and the contributing employers, have provided the groundwork for additional managed care approaches. It is expected that the cost containment measures described would not substantially add to the administrative costs.

1. The major elements of this approach are:

   a. Select physicians on the basis of demonstrated quality care and medical cost efficiency, using state-of-the-art methodology.

   b. Implement formulary for drugs and subject the prescription program to a rigorous review of appropriate use.

   c. Obtain a unit price discount of 10% to 20% in exchange for patient volume and preferred

provider status with the amount of the potential discount varying by geographic region.

d. Limit benefit payments to physicians to the Medicare allowable charge, while protecting beneficiaries from balance billing by providers.

e. Utilize Medicare's "appropriateness of service" protocols in the claims payment function where they are more stringent.

f. Create mandatory utilization review (UR) procedures, but place the responsibility to follow such procedures on the physician/hospital, not the beneficiaries.

g. Expect savings from a combination of selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, to range from 5% to 15% for medical services delivered by the managed care network. The amount of actual savings will vary by the effectiveness of utilization management.

h. To receive maximum benefits available, beneficiaries must access specialty medical care only through referral by the primary care physician pre-selected by the beneficiaries.

i. Beneficiaries have the option to use a managed care network physician or hospital at the time medical services are needed (point-of-service). The consequence of not using a network provider is a reduced benefit plan, perhaps a Comprehensive Major Medical Plan with deductibles and coinsurance with a modest annual maximum out of pocket expense or the hold harmless protection might be waived outside the network.

j. The rationale for reduced medical benefits for non-network providers is to offset the less efficient medical delivery system.

2. Comments. In those areas where there is no competition for patients among medical providers, the primary strategy for improving the cost effectiveness of the medical benefit program must primarily be mandatory UR procedures using the latest techniques available. Medical services not properly submitted to UR procedures might be subject to a penalty or no payment if a retrospective review indicates the services are not medically necessary.

Without a provider pre-agreement to accept Fund determinations of proper cost and utilization for medical services received, the "hold harmless" protection of beneficiaries from balance billing of excessive fees by medical providers will continue to be needed. Mandatory UR procedures (rather than the current voluntary UR program) reflecting state of the art techniques may be expected to reduce costs by 2% to 5% in these noncompetitive areas, which is lower than the savings possible from a managed medical delivery system.

In those areas where there is an aggregation of beneficiaries in a noncompetitive medical market, the Fund may have a meaningful impact on the medical providers. If there is no aggregation of beneficiaries, then the influence of the Fund on medical providers will be minimal, but so will the financial impact on the total Fund medical expense from the small number of beneficiaries in that area.

3. Variations on the Managed Care Option. It might also be helpful to develop a risk sharing arrangement with network providers in as many areas as possible, perhaps forming physician hospital organizations and sharing some percentage of risk for capitated risk pools.

4. Medicare Capitation Arrangement. The current administration is interested in promoting managed care applications to the Medicare population, and has negotiated a capitation arrangement between HCFA and the Funds.

It should be noted that an ideal arrangement would include both Part A and Part B benefits in some fashion which would allow the Fund to benefit from the savings potential

from reduced inappropriate use of inpatient hospital services. It is also important to remember that reduced inpatient hospital use is often partially offset by increased use of Part B Medicare benefits.

The capitation agreement with HCFA will make it even more important for the Fund to move aggressively forward with the effective use of state-of-the-art managed care techniques.

5. Long-Term Impact of Managed Care Option. The cost savings obtained through reducing benefits through deductible and coinsurance provisions result in a one-time nonrecurring savings. Once the savings achieved from reduced benefits (including any utilization reduction due to cost sharing) have been realized, the future increases in medical benefit costs will be essentially the same as the Medical Component of the Consumer Price Index (CPI).

Long-term savings from a managed medical delivery system can occur in connection with two factors:

a. Annual negotiated unit price prospective payment arrangements with providers which are linked to an appropriate external reference such as the All Items-CPI, rather than the Medical Component, or an index or reference appropriate to the coal industry, provided that overall aggregate payments are within prospectively determined limits.

b. Efficient medical care resulting in less intensity of medical services per patient served. It is expected that efficient medical care received from a managed medical delivery system will result in better quality medicine, fewer medical services per patient and better coordination of those services.

This lower utilization rate can be expected to result in a lower medical cost trend over subsequent years. It is expected that an unmanaged medical delivery system will likely require three to six years of incremental progress to achieve medical efficiency.

6. Long-Term Cost Containment. Long-term cost containment can be achieved in three ways:

a. Develop protocols of practice by the medical profession that are sensitive to resource constraints, sometimes called "standards," "guidelines," or "parameters." These are efforts by respected medical authorities to specify what are appropriate and inappropriate treatment patterns, which can specify a preferred mode of treatment or set boundaries on the range of appropriate practice. At the very least, these protocols should be developed and disseminated to physicians providing care under the Plans.

b. Apply the guidelines as a part of utilization review, with due regard to the need to maintain reasonable clinical autonomy and efficient physician decision-making.

c. Articulate expenditure targets, similar to the Medicare Volume Performance Standards, noncompliance with which could trigger further action through negotiation or by the plan administrator.

CHAPTER SIX

STATEMENTS OF COMMISSIONERS

A. Statement of Vice Chairman Henry H. Perritt. I believe that the two concepts offered at the meeting of October 17, 1990 are extremely close in their major features, and that it would have been desirable to bridge the gap and have a single recommendation. I believe that the industry-wide proposal is the better of the two.

I do not attribute the views expressed in this statement to any other member of the Commission. They are my own, and are offered to fulfill my obligation as a member of the Commission to offer my best independent judgment about the best way to solve the problem given to us, rather than offering an approach that has been tailored to conform to external constraints imposed by others' perceptions of Administration policy.

The financing crisis for retiree health care results from the concentration of funding responsibilities for a generic industry problem on a shrinking fraction of the industry. Any voluntary contractual mechanism to make such funding obligations legally enforceable is doomed to failure because the remaining contributors—have stronger and stronger incentives not to contribute voluntarily. For this reason alone, the usual collective bargaining approach under the general labor laws is not a feasible financing approach. Whatever the appropriate financing obligations are, they must be imposed by external law and made enforceable without regard to contract duration. Thus, the only question is who should be subject to the mandatory premiums.

The Administration and the Commission quite properly prefer private sector arrangements for financing and delivering health care. The coal industry is distinctive for being a sector in which a comprehensive private structure has existed for forty years to finance and deliver health care benefits. This structure has been determined by the United States Courts of Appeals in two judicial circuits to guarantee lifetime health care benefits to persons already retired. An

essential principle of private contract law is that legally operative expectations based on contracts be fulfilled. Otherwise private arrangements through contract cannot operate. That means that the commitments to the retirees must be honored.

The judicial branch of the government, however, through other judicial decisions and through delay in the litigation process, has undermined the key features of the present private arrangements. These judicial decisions allow employers to dump their retiree health benefit obligations on the existing health care funds, and to evade contribution obligations. The judicial decisions taken together say that the health benefits must be paid, while depriving the private sector of the means to pay for them. The equities here are not those of present signatories and the UMWA seeking to ensnare someone else in their private arrangements; the equitable realities are that the law has frustrated realization of a private arrangement to provide a safety net for people who have a vested right to retiree health care benefits.

A variety of other governmental policies reflected in labor law and interpretation of labor law have made it difficult for the United Mine Workers of America to maintain a sufficient organization base and contractual uniformity to secure an adequate financing base. Apart from the equities, the reality is that an historically comprehensive, innovative, and strong private arrangement for health care is falling apart. When the present system falls apart there will be instability, not only in the organized part of the industry but in the coal industry generally.

If health care delivery and financing cannot be reformed, the following scenario is conceivable. There would be a cataclysmic breakup in multi-employer bargaining in 1992, accompanied by significant economic disruption. The large individual producers that dominate BCOA would withdraw, and would take the position that the evergreen and guarantee litigation frees them, upon contract expiration, from the obligation to pay for the Funds' deficits. Regardless of the legal merits of this position, litigating the merits would take

years. The Funds, deprived of adequate contributions, would suspend, terminate, or cut back benefits to retirees, producing strike activity that might be difficult or impossible for the UMWA to control. History suggests that the strike activity would spread broadly throughout the coal industry.

In the end, someone is going to pay for retiree health care, and the amount required does not change with different definitions of the contributor population. There are only three possibilities: the retirees themselves, the taxpayer, the coal industry. The retirees cannot do it; they lack the resources. The present financing structure is falling apart, and the likelihood is that it will not exist after 1993. Seeking to continue the status quo thus ultimately throws the burden of financing health care that was promised to beneficiaries on the taxpayer. It is not good public policy deliberately to embark on a course that will make the public sector responsible for providing health care for a significant new group of retirees who historically have had a comprehensive structure for financing and delivering health care. This is not the time to dismantle private structures and enlarge the role of the public sector. An industry-wide industry financing mechanism is the only way to avoid that outcome. The Industry-Wide Funding Plan appropriately allocates financing responsibility among three groups: signatories, past signatories and the rest of the industry.

Stabilizing financing of the retiree health care system serves a number of interests. It serves the interests of proponents of private solutions. It serves the interests of those who believe in the integrity of private contracts. It serves the interests of anyone who believes that retirees who worked hard to create economic prosperity for others should not suffer from breaches of faith in delivering health benefits they were promised in their declining years.

The insistence on solving this problem entirely through collective bargaining is unrealistic and disingenuous. There is an assumption buried in the proposals for solving this problem through bargaining, which I find unacceptable. The assumption accepts as an outcome the cancellation by individual employers

of health care benefits promised to retirees (or cancellation of financing arrangements for those benefits). The Supreme Court of the United States has recognized that retirees have little bargaining power on their own. The National Labor Relations Act has been interpreted to prevent unions from representing the interests of these disempowered citizens. I cannot agree to allowing the makers of promises to walk away from their promises when these retirees are the victims. Any approach that does not provide for financing of the health care plan beyond 1993 encourages this outcome.

I do not believe that it is appropriate statutorily to require present signatories to continue to pay for benefits for someone else's retirees. Such a perpetual obligation is not imposed by the labor laws, and I am not persuaded that they agreed to pay, by themselves.

The question then becomes whether financing should be extended only to those with an historic connection with the Funds or whether it should be extended industry-wide. It is appropriate to impose some residual mandatory premiums industry-wide for two reasons: First, the mandatory premiums finance orphans, who by definition are not associated with any employer still in business; the orphan responsibility is a broad industry responsibility. Second, the boundary between past signatories and the rest of the industry is so indistinct as to be an inappropriate conceptual limitation on the financing structure.

The testimony at the Commission meeting on October 10, 1990 reveals that there is no clear line between those with an historic connection and those without such a connection.

Many of those companies who professed not to have any connection with the retiree health care financing problem have in fact mined coal with miners covered by the Funds and the collectively bargained contribution obligations and thus could be said to have "dumped" retirees, although technical definitions of "successorship" labor law may not formally obligate the surviving and testifying entities. This points up the difficulty of any solution that depends only on financing by those with a "responsibility." The very people who

proclaim lack of responsibility most vigorously have at least some de facto responsibility.

Notably, significant non-BCOA support exists for an industry-wide financing approach.

There is no such thing as mining coal and yet having no involvement in the crisis confronting health care financing and delivery in the coal industry. Contract operations are a strong phenomenon in coal mining, as are thinly capitalized subsidiaries It is not uncommon for a contract operator or a thinly capitalized subsidiary or joint venture to walk away from obligations to finance retiree health care. Frequently entities who now appear not to have had any historic involvement with the Funds were in fact involved as contributors of capital, as participants in joint ventures or as purchasers of contract coal. It is difficult to know whose hands are clean.

It is not only a matter of clean hands. It is also a matter of administrative feasibility. It is extremely difficult to build a financing mechanism that relies entirely on unscrambling the supply contracts, joint ventures, capital structures, and investment roles of a decade ago to pin responsibility on investment capital that has walked away from freely undertaken funding obligations.

Even more generally, the coal operator who sells coal at a price not reflecting contributions for retiree health care contributes to the problem by eroding the market share of the operators who must recover the costs of retiree health care not only for their own retirees but also for orphans. An industry-wide financing approach tends to level the competitive playing field, because it spreads the cost of health care more broadly.

Several variations on industry-wide financing are worth further consideration. First, and most obvious, are variations in the assessment rate structure. Assessments could be calculated based on hours, or they could be calculated based on tons mined. An hours-based formula tends to increase the burden on low-productivity operations and decrease it on

higher productivity operations. Because productivity tends to increase over time, an hours-based formula tends to erode the contribution based in the long run. Also, related to the rate structure is the fact that the rate need not be the same for all operators and for all coal. Some variation base on BTU content may be appropriate, and some variation based on past connection with the collectively bargained funds may also be appropriate.

Second, it is possible to "annuitize" the exposure for true orphans and finance this amount with a discrete number of assessments. For example, one might conclude that the present value of the cost of health care through the Coal Industry Retiree Benefit Fund from now until the year 2039 is X. An assessment of Y cents per ton for three years would raise X, thus, covering the requirement. Under this variation, no long term industry assessment would be involved.

Third, an industry-wide assessment for the Coal Industry Retiree Benefit Fund could be put in place by modifying the Abandoned Mines Land assessment as proposed in testimony by Arch Minerals Corporation, presented in the Commission's public hearing on October 10, 1990.

An essential element in the Industry-Wide Funding Plan is establishing a private, nonprofit corporation, with a strong and specific legislative mandate to use state-of-the-art managed care and cost containment techniques, as defined in Section D of Chapter Five of this Report. A statutory mandate, specifying the types of managed care procedures to be implemented, is necessary to ensure that the new entity actually uses the managed care techniques and that unanticipated legal impediments to their use do not impede cost containment efforts.

The new entities are appropriate ways to achieve cost containment. While the existing funds have made considerable progress in managing costs, historical controversies and the diffusion of governance responsibility make it difficult for state of the art cost containment to be implemented fully through the existing structure. The new entities also are necessary to improve health care delivery

more generally in the long run. Ambitious health care reform cannot be accomplished on a fragmented single employer basis; a strong central administrative mechanism is necessary to implement managed care and cost containment. Perpetuating the present structural arrangement and delivery patterns would make it more difficult to conform care delivery practices to new health care financing and delivery concepts or to integrate them with new statutory initiatives developed separate from the Coal Commission or coal industry collective bargaining.

The Industry-Wide Funding Plan makes maximum use of private institutions and economic incentives rather than compulsion. It is the only approach that produces a real prospect of managed care and cost containment, because single employer plans are not likely, as a practical matter, to have sufficient market power, expertise, or emphasis.

The separate Coal Industry Retiree Benefit Fund also is appropriate because secure, broadly-based financing for the orphans cannot be arranged through a collectively bargained structure. A significant part of the industry is not organized by the UMWA. Any structural arrangement that forces this part of the industry to make contributions or premium payments to a collectively bargained delivery mechanism is infeasible. A new entity established by law and made appropriately accountable to public institutions is necessary to avoid these problems.

There is no reason to suppose that creating a new entity, such as the Coal Industry Retiree Benefit Fund proposed creates a new government entitlement program. The Coal Industry Retiree Benefit Fund is a private corporation, and its obligations are not those of the government. Political pressures to increase benefits or to change the financing mechanism would be no different in kind or character from political pressures against any energy tax or in favor of amending the copyright laws -- to identify two subjects in recent experience.

There are significant considerations relating to the presidential value of the Commission's recommendations and

the political reactions thereto. The managed care part of the solution could serve as a precedent for other industries. In contrast, the financing mechanism need not represent a precedent for other industry. The coal industry can be distinguished from other industries with respect to the genesis of the immediate problem, the consequences of failure to solve it, and the government' historic intervention.

The Industry-Wide Funding Plan does not represent the ultimate solution to health care financing and delivery in the coal industry, that will take much debate and more time. The proposal does represent a sound structure within which longer term comprehensive reform can occur.

B. Statement of Commissioner Richard M. Holsten. It is with deep regret that I voice this dissent to the Industry-Wide Funding Plan (the UMWA/BCOA proposal) aimed at resolving the financial deficiencies currently being experienced by the two UMWA health funds. There are at least three areas in that proposal that I cannot in good conscience support.

1. I have no objection to the creation of a new health fund, although I would strongly recommend it be limited to present orphans only so as to avoid an open-ended perpetuation of today's problems. It is the proposed method of financing that bothers me.

The vast majority of coal producers on whom this new tax would fall are not now members of either the BCOA or the UMWA. Most of them have never been part of either group and thus have had no role in the creation, implementation or administration of the Funds. To require these companies now to bail out their direct competitors' health care responsibilities in addition to funding their own employee health care programs would be grossly inequitable and would amount to a subsidy of signatory operators that is no more justified than would be the use of federal tax revenues which the Commission unanimously opposes.

2. The proposal would also broaden the financing base for present UMWA retirees by requiring all former UMWA

employers back to 1978 to contribute to the 1950 Fund on a per capita basis (the "reachback provision").

First, I acknowledge the guarantee of lifetime health benefits that has been contractually made to UMWA pensioners and their dependents. This guarantee has to be honored. Yet there are many companies who, for very valid strategic or economic reasons and using entirely legitimate means, have withdrawn from the Union and, at least according to the courts today, from their obligations to the Funds.

I agree with that part of the Industry-Wide Funding Plan that would tighten up withdrawal provisions in the future. However, to retroactively apply those same restrictions to companies who have legally withdrawn in the past would not only be highly unfair but would upset the very delicate market balance between union and non-union production that exists today within our intensely competitive industry.

Furthermore, this portion of the proposal would establish a dual standard for contract compliance. On the one hand, signatory operators would be required to honor their commitments to fund retiree health care costs. The union, on the other hand, would be relieved of any contractual concessions it may have willingly made to certain coal operators in the form of lower contribution rates to these same funds. If one party to a contract is obligated to honor its commitments, so must the other. The retroactive "reachback" provision would negate that mutuality of commitment and would make a sham of the collective bargaining process.

3. The proposal does very little to correct the underlying deficiencies that have led to the financial crisis currently faced by the Funds, namely, the extremely high cost of health care benefits that are being underwritten by signatory operators.

Apart from some general cost containment features, which may or may not translate into hard dollars, and a proposed tightening of the withdrawal provisions, there is little in the way of cost reduction, cost sharing, eligibility review or

other efforts to lower the cost of providing health care benefits. Thus, the Industry-Wide Funding Plan is pretty much business as usual for signatory operators but spread the pain to others.

The basic cause of the Funds' problems today has really nothing to do with the federal government as some would profess. That argument is a smoke screen. Nor is this a "generic industry problem" as characterized by some. This is simply a UMWA problem and a BCOA problem that, while serious in itself, is restricted to a relatively small and shrinking sector of the U.S. coal industry. It has nothing to do with nonunion companies which today comprise a growing majority of the industry. It is the cumulative result of the collective bargaining process over the years, as far back as 1950, in which the BCOA has progressively made improved health care commitments to the UMWA, commitments that may have been entirely rational at the time but have now become economically unbearable.

The long term solution lies also in the collective bargaining process, not in government intervention and certainly not in a tax on noninvolved parties. The BCOA and the UMWA in their next negotiations in 1993 will have the opportunity to correct the mistakes of the past by revising their new National Bituminous Coal Wage Agreement to better reflect the economic realities of today's market environment.

In the interim, between now and 1993, a bridging can be achieved through the use of surplus pension assets, through cost containment and through reasonable cost reductions. The interim costs to signatory companies, as shown by the Commission's own actuarial projections, would be modest and future costs would be manageable.

Simply put, this is not an industry-wide problem. It does not require an industry-wide solution. This is a BCOA/UMWA problem created by the collective bargaining process and correctable through that same process. In the interim, the present deficits can be eliminated and a smooth and relatively painless transition can be made involving present signatory companies only.

C. Statement of Commissioners Michael J. Mahoney, Carl J. Schramm, Arlene Holen, Richard M. Holsten

I.

HEALTH CARE FUNDING SHOULD PRESERVE THE INTEGRITY OF THE COLLECTIVE BARGAINING PROCESS

Limiting obligations to signatories rests on several considerations. Primemost is that the Benefit Funds are a creature of collective bargaining. Thus, to establish a federally established power to compel non-signatories to contribute to a creature not of their making is fundamentally inequitable and unsound public policy. Since the passage of the Wagner Act, collective bargaining has been, as a matter of public policy, the avenue of resolution for industrial conflict in the United States. This process rests on the ability of the parties to measure each other's bargaining strength and reach a joint resolution of their differences. To erect non-contract streams of revenue to the Funds is to impose the outcome of bargaining on outside parties. To achieve such an outcome would require the subversion of the process of collective bargaining in the coal industry. It would establish artificial subsidies to the implicit price of benefits to the signatories, making the costs of settlement fall on parties altogether removed from the process itself. It would weaken the integrity of the collective bargaining process by providing incentives for promised benefits that cannot be delivered. It would further weaken incentives to monitor contract compliance.

II.

HEALTH CARE FUNDING SHOULD NOT CREATE MARKET INEFFICIENCIES

There is a larger question of social policy relating to industrial efficiency. To establish artificially lower-than-market prices to the signatory parties for the costs of health benefits is to invite inefficient behavior from signatory firms. Such a system clearly establishes a tax whose marginal incidence

would fall on non-signatory operators. Any such system of taxation, neither demonstrably progressive nor fair, establishes what economists call welfare losses. Such losses reflect lost wealth to the economy or society as a result of incentives that implicitly reduce system-wide efficiency. In this case, the firms receiving the transfer will operate at sub-optimal levels, a micro-economic appearance of the phenomenon of moral risk. As the testimony repeatedly suggested, still further incentives to non-signatory operators to avoid the tax would arise.

III.

INEQUITABLE TO IMPOSE BURDEN ON NON-RESPONSIBLE OPERATORS

Issues of elemental fairness are involved. The record shows that reprehensible practices as regards successorship exist in this industry. Thinly capitalized operators, often the sham invention of larger firms, come and go in a fashion that appears to exist only to avoid the risk of being held as a party to the collectively bargained agreement regarding pension and welfare benefits. Nevertheless, while such behavior cannot be condoned, respectable operators who made decisions in the past to move to different locales, invest in different technology, or pursue their business with or without respect to union presence must be recognized. To reach to such firms ex post facto for funding of the bargained benefits, which in many cases will not relate to their own employees either past or present, is nothing but fiscal expedience that cannot be justified.

IV.

SOUND TAX POLICY ARGUES AGAINST SUBSIDIZING THE FUNDS

The notion of taxation of any industry in a fashion different from any other must be viewed with the most vigorous skepticism. In the case of the mining industry, what would evolve under the new tax proposed might be viewed as a system of state-sponsored health care for those who are tied to one

industry. There is no "special case" justification for such a result. While mining has been benefited by government intervention in the past, and has also suffered at the hands of a judiciary inclined to make convenient if not economically-justified decisions to place certain workers under the protection of the Funds, such a history does not compel a conclusion that federal tax policy should operate to subsidize the Funds in the future. To find otherwise would result in a federally supervised tax-based system of health care finance which could be used as precedent in other industries in the future.

V.

NEITHER BLACK LUNG OR ABANDONED MINES PROGRAM SERVES AS PRECEDENT

Much has been made of the precedential value of both the black lung program that reaches all workers and operators in the industry, as well as the program for land reclamation that imposes costs on all firms in the industry. These programs are separable from the question of an industry-wide tax on operators to fund health benefits. In the case of black lung, the program was established as an entitlement whose funding was guaranteed by government. Funding has been provided by the coal industry and general revenues. But apart from the commitment of general revenues to such benefits, the pneumoconiosis program is similar to that of mine reclamation in that both black lung and surface despoliation are common in varying degrees to all coal mining operations. Contractually established benefits, on the other hand, fall only on the parties who contract, and within this universe, the benefits vary widely depending on the circumstances governing the outcome between the union and a specific operator. Witness the existence of non-union firms and non-conforming contracts as evidence. Because of the indivisibility of labor inputs, established as a part of our national labor policy, neither the Black Lung or Abandoned Mines Land Fund serve as precedent to consider in this case.

VI.

ANY NEW TAX SHOULD DEFRAY BLACK-LUNG DEFICIT

The coal industry has been subsidized by forgiveness of interest on the indebtedness of the Black Lung Disability Trust Fund, the deficit of which already exceeds $3 billion. This deficit would have been about $1 billion higher, had not interest accruals been stopped by Congress for five years, between 1986 and 1990. Thus, the Black Lung Disability Trust Fund, which was set up to pay benefits which are the responsibility of the coal industry, has been heavily subsidized by US. taxpayers. Any new industry-wide tax should properly be used first to defray outstanding black lung obligations.

VII.

INEQUITABLE TO FORCE COSTS ON THOSE WITH LESSER BENEFITS

The imposition of an industry-wide tax to support retiree health benefits would create another serious distortion and inequity. Coal users would pass on the implicit costs to their customers. To advance such a position, given that the benefits provided under the contract are fairly described as significantly better than the scope of benefits enjoyed by a majority of working men and women in the United States, would be to force the cost of this substantially above average benefit package on many men and women with no health insurance benefits at all or benefits of lesser quality. Such an outcome is unacceptable given the existence of uninsured individuals in the nation.

VIII.

NEW ENTITY WOULD CREATE FEDERAL LIABILITIES

Establishing a new federal entity, the Coal Industry Retiree Benefit Fund, which would be financed by an industry-wide tax as in the UMWA/BCOA proposal, essentially creates a

federal corporation to broadly guarantee health benefits for both union and non-union operations in the coal industry. Such a federal guarantee of privately-determined health benefits is unprecedented and likely to create enormous future liabilities for the federal government.

CHAPTER SEVEN

CONCLUSION

No fewer than four advisory councils have been charged with the task of studying the problem of health care in America. This suggests that the rising cost of health care may be one of the greatest challenge facing our nation today. It most certainly is the greatest challenge facing the coal industry.

The Commission believes that this Report will be a valuable resource for policy makers because it does not simply analyze the issues involved, and then offer recommendations, but instead contains workable solutions to the complex and troubling problem of providing retiree health care for coal miners.

While the difficulty of providing health care for retired coal miners is symptomatic of the overall health care crisis, the recommendations contained within the Report are specifically tailored to the coal industry. These recommendations, however, are based upon general principles which can be utilized by any industry or provider of health care.

In this era of increasingly difficult fiscal constraints, responsible differences of opinion exist with respect to how to provide long-term financing for the UMWA Health and Retirement Funds. While acknowledging this fact, the Commission is unanimous in expressing a deep sense of urgency that steps be taken to address this problem right now.

APPENDICES

Appendix 1	Controlling Questions
Appendix 2	Principles
Appendix 3	Contribution Rates
Appendix 4	List of Acronyms

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APPENDIX 1

QUESTIONS RAISED DURING COMMISSION DELIBERATIONS

a. Should financing be accomplished through current signatories only?

b. Should financing be accomplished through a group including present signatories and former signatories as of, e.g., 1978 or 1988?

c. Should financing be accomplished through a group, including present signatories, past signatories, and all others in the industry?

d. Can financing be accomplished by contract or is legislation required?

e. Is a new organizational entity required should the present fund, as is or as modified, continue?

f. Should the beneficiary class be frozen or "capped" to include only those presently retired or those as of some date in the future?

g. How should "beneficiary" be defined? Should re-enrollment occur? How should dependents be covered? Should active miners and retirees who are participants in single employer plans be eligible to participate in the multi-employer plan?

h. Assuming that it is necessary to define control group or "affiliate" to implement past signatory contribution obligations or to prohibit dumping, how should those concepts be defined to cover joint venture partnerships, corporate subsidiaries, and parties to supply contracts?

i. How should bankruptcy affect contribution obligations?

j. Under what circumstances can contributing employers terminate the obligation to contribute? What kind of withdrawal liability should exist?

k. What changes, if any, should be made to the preliminary report on cost containment issued on October, 11, 1990?

1. What use, if any, should be made of the pension surplus? Transfer all of the assets to the health care plan? Transfer some of the assets to beneficiaries to fund new co-payments? Use some or all of it for a general pension increase?

m. What should the formula be for contributions? Should contributions be based on tonnage or hours? What should the rate structure be?

n. What forms of contribution might be considered other than traditional contributions by employers?

o. What additional data is required?

APPENDIX 2

PRINCIPLES

In discussing the problem and proposed solutions, sharp differences of opinion were expressed and numerous ideas were exchanged. To assist the Commission in finding a long term solution to the problem of the deficits facing the UMWA Health and Retirement Funds, 14 general principles concerning delivery, funding and general considerations were discussed and generally agreed upon by the Commission.

The 14 principles are as follows:

DELIVERY

1. The health care delivery system should be designed to honor the expectations of coal miners, based on commitments made under the terms of the various National Bituminous Coal Wage Agreements.

2. The health care delivery system should be financially sustainable and the risks covered should be insurable; it should not motivate contributors to seek relief from the program.

3. Any redesigned health care delivery system should reflect current practices that ensure quality and cost effective health care services, including appropriate managed care, plan design, effectiveness of care provided, and cost containment practices.

4. Persons and institutions with a commitment to provide health care should not dump that responsibility on other employers or on public agencies.

5. Because of the nature of the beneficiaries, a multi-employer funding and administration arrangement is necessary to cover retirees under the 1950 and 1974 Benefit Trusts and those who will become eligible for benefits under those Trusts.

6. There should be a central funding and administration arrangement to cover retirees and active employees of operators who wish to provide coverage through such a central arrangement.

7. There must be a clearly defined program, possibly based on regulation and/or competition, to ensure that the program is properly administered and its assets well spent. This is particularly true in the case of mandatory contributions.

8. An effort should be made to define a mechanism to provide a suitable arrangement to cover active and retired miners with health care insurance consistent with insurance principles and proper safeguards with respect to cost and nature of care. A wide range of options should be considered, including reconfiguration of benefits to develop private markets for long term retiree health care insurance, and ensuring the availability of health insurance at reasonable cost to small coal industry employers.

FUNDING

9. The contribution base must be extended on an equitable basis beyond current contributors. The "last person out" phenomenon should be prevented.

10. A governmental role will be necessary to ensure contributions by those with an obligation to contribute.

11. A near term funding source must be found for meeting requirements associated with the larger orphans burden and the smaller contribution base for 1950 Benefit Fund beneficiaries.

12. All other appropriate sources of funding should be explored, consistent with the foregoing principles, to lessen the burden on active employers of providing health care benefits.

GENERAL

13. The role of the federal government should be minimized, and the role of private institutions, including collective bargaining, should be emphasized and strengthened.

14. No approach represents a solution unless it has genuine support from labor and management.

APPENDIX 3

CONTRIBUTION RATES
UMWA HEALTH AND RETIREMENT FUNDS

	Rate per Ton	Rate per Hour
June 1, 1946	$0.05	
July 1, 1947	$0.10	
July 1, 1948	$0.20	
March 6, 1950	$0.30	
October 1, 1952	$0.40	
1971 Agreement		
November 12, 1971	$0.60	
November 12, 1972	$0.65	
May 12, 1973	$0.70	
November 12, 1973	$0.75	
May 12, 1974	$0.80	
1974 Agreement		
December 6, 1974	$0.74	$0.90
December 6, 1975	$0.78	$1.40
December 6, 1976	$0.82	$1.54
1978 Agreement		
March 27, 1978	$1.39	$0.92
April 27, 1978	$1.39	$0.77
March 27, 1979	$1.39	$0.78
March 27, 1980	$1.39	$0.77
1981 Agreement		
June 7, 1991	$1.43	$1.04
June 7, 1982	$1.59	$1.00
June 7, 1983	$1.60	$1.02
1984 Agreement		
October 1, 1984	$1.79	$1.03
October 1, 1985	$1.79	$0.97
October 1, 1986	$1.82	$0.97
October 1, 1987	$1.82	$1.02
1988 Agreement		
February 1, 1988		$2.38
July 1, 1988		$2.55
February 1, 1989		$2.68
May 1, 1989		$2.85
February 1, 1990		$2.96
August 1,1990[19]		$3.21
September1, 1990[20]		$3.96

[19] Four month $0.25 rate increase pursuant to court injunction.

[20] Four month $0.75 rate increase pursuant to court injunction.

APPENDIX 4

LIST OF ACRONYMS

BCOA	-	Bituminous Coal Operations' Association
BTU	-	British Thermal Unit
CPI	-	Consumer Price Index
DOL	-	U.S. Department of Labor
ERISA	-	Employee Retirement Income Security Act
FACA	-	Federal Advisory Committee Act
FDA	-	Food and Drug Administration
FOIA	-	Freedom of Information Act
GSA	-	General Services Administration
HCFA	-	Health Care Financing Administration
HHS	-	U.S. Department of Health and Human Services
HIAA	-	Health Insurance Association of America
HMO	-	Health Maintenance Organization
JCAH	-	Joint Commission for Accreditation of Hospitals and Organizations
NBCWA	-	National Bituminous Coal Wage Agreement
PPO	-	Preferred Provider Organization
TPA	-	Third Party Administrator
UAW	-	United Auto Workers
UMW	-	United Mine Workers
UMWA	-	United Mine Workers of America
UR	-	Utilization Review
USWA	-	United Steel Workers of America

(8)

DEC 11 1997

No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR PETITIONER

JOHN T. MONTGOMERY
Counsel of Record
JOHN H. MASON
ROBERT DANIEL O'CONNOR
DALILA ARGAEZ WENDLANDT
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000

L. WILLIAM LAW
SARA JOHNSON MYERS
EASTERN ENTERPRISES
9 Riverside Road
Weston, MA 02193
(617) 647-2300

Counsel for Petitioner

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

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QUESTIONS PRESENTED

1. Whether the Coal Act violates the Due Process Clause by imposing liability on Eastern for lifetime retiree health benefits, nearly thirty years after Eastern ceased coal operations, where Eastern neither promised such benefits nor contributed to the financial instability of the UMWA employee benefit plans that led to the Coal Act.

2. Whether the Coal Act violates the Takings Clause by appropriating Eastern's property, in a manner that was unforeseeable at the time Eastern ceased coal operations in 1965, to remedy a problem of financial instability of the UMWA employee benefit plans that Eastern did not cause.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust and that it has no parent company or non-wholly owned subsidiary.

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner Eastern Enterprises. The Defendants to the proceedings below were Respondents Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The Third Party Defendants to the action below were Respondents Peabody Holding Company, Inc., Coal Properties Corp., and Eastern Associated Coal Corp.

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Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 22

Lewis v. Pennington, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd in part and rev'd in part*, 400 F.2d 806 (CA6), *cert. denied*, 393 U.S. 983 (1968) 30

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Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ..... *passim*

Legislative History

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H.R. REP. NO. 102-1018 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472 14

Secondary Sources

COMM. ON WAYS & MEANS, 104TH CONG., DEV. & IMPLEMENTATION OF THE COAL INDUS. RETIREE HEALTH BENEFIT ACT OF 1992 (*Comm. Print* 1995) 17

MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS, A BIOGRAPHY 469-89 (1977) 30

GEN. ACCOUNTING OFFICE, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE NO. GAO/HRD-90-92 (Mar. 1990) 49

Jan G. Laitos, *Takings & Causation*, 5 WM. & MARY BILL RTS. J. 359 (1997) 37, 38, 40

MASSACHUSETTS CORPORATION LAW & PRACTICE (Richard W. Southgate & Donald W. Glazer eds. 1997) 47

Frank Michelman, TAKINGS, 1987, 88 COLUM. L. REV. 1600 (1988) 36

Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 22

William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) 36

Joseph Tassman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949) 25

John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. VA. L. REV. 633 (1991) 5

Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit (Pet. App. A1-A23) is reported at 110 F.3d 150. The Judgment and the Order of the United States District Court for the District of Massachusetts (Pet. App. A24 and A25-A27, respectively) are unreported.

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and is reproduced in full in the Appendix to the Brief for Respondents UMWA Combined Benefit Fund and Its Trustees in Opposition to Certiorari.

Statement of the Case

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 (the "Coal Act"), as applied to Eastern Enterprises ("Eastern").

Under the Coal Act—which was enacted nearly 30 years after Eastern ceased all mining activities and transferred all its coal mining operations to a subsidiary—Eastern is retroactively assigned responsibility to provide lifetime health benefits for retired miners who were employed by Eastern for

varying periods of time between 1946 and 1965, and their dependents. As a result, Eastern faces an actuarially projected liability of more than $100 million. This liability has been imposed notwithstanding that Eastern never agreed or promised to provide lifetime health benefits to these former employees or their spouses and children, made all of the specified contributions to the benefit plans it agreed to pay, and had no control over the discretionary benefits provided by the union benefit plans. Moreover, Eastern faces this liability even though its subsidiary made all contributions after 1965 that Eastern would have made, and hence its departure from the coal business did not burden the union benefit plans in any way. Nor did Eastern contribute to the health care funding difficulties that arose decades later that prompted Congress to intervene. The union benefit plans became financially unstable after subsequent labor agreements provided specified benefits that the signatories to more recent agreements ultimately became unwilling to fund.

Set forth below is a detailed statement of the relevant facts regarding the history of the various coal industry retiree health benefit plans for members of the United Mine Workers of America (the "UMWA"), the development and operation of the Coal Act, and Eastern's relationship with both.

1. Eastern Enterprises and Its Mining Operations

Eastern Gas and Fuel Associates (known today as Eastern Enterprises) was organized in 1929 as a Massachusetts business trust. JA 90a.[1] For many years, Eastern has owned Boston Gas Company, New England's largest distributor of natural gas, and Midland Enterprises Inc., a leading barge operator on the nation's inland waterways. *Id.* Until 1965, Eastern also conducted extensive coal operations—primarily in West

[1] As used herein, "JA" refers to the Joint Appendix filed under Sup. Ct. R. 26, and "RA" refers to the Joint Appendix submitted to the United States Court of Appeals for the First Circuit under Fed. R. App. P. 30(a), two additional copies of which have been lodged with the Clerk.

Virginia and Pennsylvania—through its Coal Division. *Id.* During that time, Eastern employed UMWA miners and was a signatory to all collective bargaining agreements between the coal companies and the UMWA between 1947 and 1964. RA 1840-41.

Prior to 1946, the coal companies (including Eastern) provided health care to coal miners through a prepaid, fee-based system funded by payroll deductions.[2] JA 261a. After the creation of the first union health and welfare fund in 1946, the National Bituminous Coal Wage Agreement ("NBCWA") of 1947[3] created the UMWA Welfare and Retirement Fund of 1947 (the "1947 W&R Fund"), a union welfare trust to be managed by three trustees, one appointed by the UMWA, one appointed by the operators, and the third appointed by the first two.[4] RA 618. The agreement did not require the 1947 W&R Fund to provide specific benefits to miners, retirees, or their dependents. Instead, it required each signatory operator to pay a royalty of ten cents per ton of coal produced or sold during the term of the agreement. RA 615. The trustees were charged to administer

[2] In 1946, during collective bargaining negotiations between the UMWA and bituminous coal companies, the UMWA sought the creation of a health and welfare fund for its members. JA 262a. The coal companies rejected the UMWA's request, as a result, the UMWA initiated a strike. *Id.* More than a month into the strike, President Truman directed the Secretary of the Interior to take possession of the coal mines and to negotiate appropriate changes in the terms and conditions of employment with the UMWA. *Id.* The Secretary and the UMWA, *inter alia*, created a medical and hospital fund to provide miners with health benefits to be funded through payroll deductions. JA 263a.

[3] The 1947 NBCWA was negotiated after control of the mines was returned to the mine operators. JA 99a-100a.

[4] The 1947 W&R Fund was the first multiemployer plan organized under Section 302(c) of the Labor Management Relations Act), 29 U.S.C. § 186(c). The "Taft-Hartley Act" was designed in part to respond to demands by the UMWA that all mine owners contribute ten cents per ton of coal produced to "a central welfare fund established by the union." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 n.14 (1981).

the resources to be contributed to the fund by signatory employers, and to establish the various benefits that would be provided, as well as the terms of eligibility. RA 619-20. The 1947 W&R Fund operated on a current year, "pay-as-you-go" basis under which benefits were paid from, and limited by, the available funds from current royalty receipts, rather than from the income from accumulated principal.[5] JA 101a, 264a; RA 619-21.

In 1950, the UMWA and various coal operators (including Eastern) executed a new NBCWA. This agreement established a successor fund, the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"), that mirrored the terms of the 1947 W&R Fund and raised the operators' contribution to thirty cents per ton. JA 101a-102a; RA 638-41. Between 1950 and 1974, the 1950 NBCWA was amended from time to time, but the terms and structure of the 1950 W&R Fund remained essentially unchanged. JA 102a. The coal operators were required to make set royalty contributions to the Fund, on a several and not joint basis, "during the life of th[e] [a]greement."[6] RA 640. The 1950 W&R Fund trustees continued to operate the fund on a current year, pay-as-you-go basis. JA 102a. Throughout this period, the trustees maintained a discretionary program, providing health care benefits for miners, retirees, and their dependents, and also providing limited benefits to the widows and dependent survivors of deceased miners and retirees.[7] JA

[5] The employer-appointed trustee initiated litigation to restrain the majority trustees from using this method of financing, but this suit was rejected in *Van Horn v. Lewis*, 79 F. Supp. 541, 546 (D.D.C. 1948).

[6] Since the companies were only obligated to make specific contributions, "by definition, there [could] never be an insufficiency of funds in the plan to cover promised benefits." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 230 (1986) (O'Connor, J., concurring) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980)).

[7] Between 1954 and 1967, widows and dependent survivors received health benefits for a period of 12 months following the death of the miner. RA 913, 923, 943, 976, 1018, 1059, 1091, 1124, 1161, 1187, 1218, 2003-04. From 1967 to 1974, health benefits were provided to such widows and dependent survivors for two or five years, depending on whether the miner was actively employed at the time of his death. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 567 (1982); *see also* RA 2005-06.

104a. The published eligibility criteria and levels of benefits were determined solely by the trustees, JA 104a, and beneficiaries of the plan were specifically told that benefits were not vested and could be revoked at any time by the trustees. RA 103a-107a.

For example, the annual reports of the 1950 W&R Fund from 1951 through 1966 each stressed that all "[b]enefits are subject to termination, revision or amendment by the Trustees *in their discretion at any time*" and that "*[n]o vested interest in the Fund extends to any beneficiary.*"[8] Likewise, the 1950 W&R Fund annual reports for 1956 to 1965 specifically stated: "Each beneficiary is officially notified of this governing provision at the time his [b]enefit is authorized."[9] In fact, the trustees frequently exercised their authority to revise eligibility requirements for 1950 W&R Fund benefits and to alter, rescind, and reduce particular benefits.[10] JA 105a-107a; *see also* John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. VA. L. REV. 633, 642 (1991) ("Benefits were adjusted to comport with available funds and, on

[8] RA 870, 929, 956, 995, 1028-29, 1047, 1080, 1113, 1146, 1191, 1223 (emphasis added). The 1950 W&R Fund annual reports for 1951 to 1954 and 1957 are not included in the record.

[9] RA 956, 995-96, 1028-29, 1047, 1080, 1113, 1146, 1191.

[10] Examples of specific benefits that were reduced or eliminated are set forth at RA 1018, 1021 (terminating, in 1960, health benefits for miners and their dependents if the miners were self-employed or in any way connected with ownership or management of mines); *id.* (terminating, in 1960, health benefits for miners and their dependents if miners were unemployed for one year); RA 1027 (terminating, in 1960, widows' and orphans' benefits for some beneficiaries); RA 1053-54 (reducing, in 1961, pension benefits from $100 to $75 a month); RA 1235, 1238, 1243-45 (temporarily rescinding, in 1950, health benefits for widows and dependent children); RA 1231, 1246 (altering, in 1953, death benefits for widows and dependent children).

occasion, entire categories of beneficiaries lost their eligibility.").

2. Eastern's Transfer of its Coal Operations

In 1963, while the 1950 W&R Fund was operating on a pay-as-you-go basis, Eastern decided to transfer all of its coal-related operations to a new subsidiary, Eastern Associated Coal Corp. ("EACC"). JA 90a-91a. At that point, Eastern had been a signatory to each NBCWA between 1947 and 1964 and had made all of the mandated contributions to the funds—in excess of $60 million. RA 2626. The transfer of all of Eastern's extensive coal-related assets to EACC was complete by the end of 1965,[11] and Eastern's Coal Division then ceased to exist. JA 91a. As Eastern reported to the IRS in its 1966 tax return, EACC "assumed all of the liabilities of [Eastern] arising out of the coal mining and coal marketing operations of [Eastern]."[12] RA 263; *see also* RA 203, 209, 214. In consideration for the transfer of the coal business, Eastern received all of EACC's stock.[13] JA 90a.

Following completion of the transfer of Eastern's coal mining operations, EACC stood in Eastern's shoes for all

[11] In 1966, after Eastern had ceased mining coal and transferred all its coal operations to EACC, the 1950 W&R Fund had a positive balance of $145,021,431. RA 1207.

[12] The Respondents did not submit affidavits or seek discovery below concerning EACC's succession to Eastern's coal-related assets and liabilities. *Compare* JA 90a-97a *with* JA 126a-129a, 218a. While EACC contested whether its assumption of liabilities included those under the Coal Act, JA 142a-148a; RA 2106-09, the district court did not address any factual disputes, nor did it decide whether Peabody has standing to raise them in this action. In any event, there is no dispute that EACC took over Eastern's former coal operations and made all contributions to the 1950 W&R Fund, and its successor plans, that Eastern would have made. RA 1566.

[13] Between 1966 and 1987, Eastern received dividend payments from EACC aggregating more than $100 million as a return on Eastern's contribution of the coal operations to EACC. RA 357, 397, 439, 496, 2188, 2191.

purposes in connection with the former Coal Division.[14] JA 90a-92a. Thus, EACC took over Eastern's contracts with the UMWA and replaced Eastern as a member of the Bituminous Coal Operators Association ("BCOA"), the multiemployer organization that negotiated with the UMWA. RA 211; 1840-41. From 1966 to 1987, EACC was a signatory to the various NBCWAs, RA 1566, 1841, and continued to make all required contributions to the various UMWA health benefit plans, remitting over $233 million to the UMWA funds in satisfaction of its obligations under various NBCWAs. RA 1566, 2626. By 1986, EACC was operating more mines and producing at least as much coal as Eastern had at the time that it created EACC. RA 1566. Throughout this entire period, EACC employed UMWA miners in all of its mines. *Id.*; RA 211-12.

While Eastern continued to hold EACC's stock for some years after its creation, Eastern sold all of its interest in EACC to Peabody Holding Company, Inc. ("Peabody") in 1987. JA 97a. Because Eastern merely transferred EACC's stock to Peabody, EACC retained all the liabilities that EACC had assumed from Eastern in 1966, and that factor was reflected in the price that Eastern received for the EACC stock. RA 216-217. After 1987, EACC continued as a viable mining operation, still employing UMWA miners. RA 1841,

[14] EACC routinely represented in filings with the Securities and Exchange Commission, in disclosures to prospective lenders, and in other contexts that it was the "successor" to Eastern's Coal Division. RA 265, 277, 339, 375, 415, 464, 518, 574. EACC also treated Eastern's former employees as if they had originally been employed by EACC. For example, when federal and state black lung legislation was enacted in the 1970s creating new rights authorizing affected miners to file claims against their former employers, EACC processed and (when appropriate) paid black lung claims of miners who retired from Eastern's Coal Division before the creation of EACC. RA 210-11, 215, 219-20. Similarly, when miners required a record of employment, EACC provided statements and letters of reference showing years of service with "this company" that included pre-1966 years with Eastern's Coal Division. RA 223-24, 236-37.

1843-44.

3. The Post-1974 Structure and Operation of the UMWA Plans

In 1974, almost a decade after Eastern ceased its own coal operations, the 1950 W&R Fund was substantially restructured. In response to the pension funding requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the BCOA and the UMWA entered into a new NBCWA that created four new trusts to replace the 1950 W&R Fund. JA 107a-108a; RA 747-49. Two were pension trusts,[15] and two were benefit trusts. The UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Plan") provided health benefits to miners who retired before January 1, 1976, and their dependents, and the UMWA 1974 Benefit Plan and Trust (the "1974 Benefit Plan") provided health benefits to both active miners and retired miners who retired on or after January 1, 1976, and their dependents (collectively "the Benefit Plans"). RA 747-49.

The 1974 NBCWA provided for the first time that "the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in [the NBCWA]," as distinct from being established by the trustees of the funds. *Robinson*, 455 U.S. at 566. The 1974 agreement was also the first to mention retiree health benefits, and provided for "a Health Services card for life" for retired miners and their dependents. RA 755-59. Nevertheless, like all prior NBCWAs, the 1974 agreement stated that the obligation of the signatory operators continued only "during the life of this [a]greement," RA 749, and beneficiaries were still reminded as late as 1977 that benefits could be suspended

[15] The two pension trusts were the UMWA 1950 Pension Plan and Trust (the "1950 Pension Trust") that provided pension benefits to miners who retired before January 1, 1976, and the UMWA 1974 Pension Plan and Trust (the "1974 Pension Trust") that provided pension benefits to miners who retired after January 1, 1976. RA 756.

or reduced "in the event that the assets [of the Benefit Plans] became insufficient to pay the benefits." RA 1260.

In 1978, the 1974 Benefit Plan was restructured. Following a lengthy strike, the BCOA demanded and won the right for its members to provide health benefits directly to their own active employees and recent retirees who were eligible for benefits from the 1974 Benefit Plan through individual company-sponsored plans. JA 110a, 271a. As a result, the 1974 Benefit Plan thereafter focused on providing health care coverage to those UMWA retirees in the 1974 Benefit Plan whose employers were no longer in the coal business. RA 777-79. The 1950 Benefit Plan remained unchanged. RA 777.

The 1978 NBCWA also contained, for the first time, a "guarantee clause" that essentially obligated signatory operators to increase contributions to the Benefit Plans during the term of the agreement, if and when required, to guarantee sufficient funding for the schedule of medical benefits in the agreement, but only until the expiration of the agreement. RA 779, 787-88. These changes in the 1974 and 1978 NBCWAs altered the contractual obligation from the provision of only specified contributions to the assurance of defined benefits during the term of the contract. The 1978 NBCWA also incorporated the "evergreen clause" that required signatories to make plan contributions as required under the 1978 NBCWA and "any successor agreements thereto" in accordance with the contribution formulas set forth in the agreements. *See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 472 n.1 (D.C.C. 1993). Nevertheless, like all prior NBCWAs, the 1978 agreement also contained language limiting the contributory obligation to the "term of this [a]greement." RA 779; *see also* RA 792. The structure of the benefit provisions of the 1978 NBCWA was incorporated essentially unchanged in subsequent agreements in 1981 and 1984. JA 111a.

In the late 1970s and through the 1980s, a combination of events jeopardized the financial stability of the Benefit Plans. JA 108a-109a, 272a-273a. In addition to increases in health care costs, the consolidation of the coal industry resulted in the withdrawal of a large number of employers from participation in the NBCWAs. RA 1464. Companies that withdrew from participation in the Benefit Plans did not continue to provide coverage to former employees under the individual benefit plans established under the 1978 NBCWA, and the courts confirmed that the obligation of the withdrawing employers to maintain such individual plans was limited to the "term of th[e] [a]greement," *see District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 591 (CA4 1985). These companies also discontinued making contributions to the 1950 and 1974 Benefit Plans. JA 113a, 287a, 300a-301a. Nevertheless, the 1974 Benefit Plan was obligated to provide continuing benefits to miners who had been promised lifetime benefits under the 1974 or later NBCWA, even if their employers were no longer participating in the NBCWAs. *See UMWA v. Nobel*, 720 F. Supp. 1169, 1179-80 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (CA3 1990). As additional coal operators who had signed the 1974 and later NBCWAs ceased maintaining individual plans or contributing to the 1950 and 1974 Benefit Plans, the remaining employers nevertheless agreed in each subsequent agreement to provide guaranteed benefits to the entire class of eligible participants. JA 111a-113a.

By the end of the 1980s, the financial condition of the Benefit Plans had declined significantly. JA 287a-289a. The 1974 Benefit Plan had its first operating deficit in 1987 and ended fiscal 1988 with a net deficit of approximately $18 million. RA 1439-42. Nevertheless, in 1988, the UMWA and the BCOA entered into a new NBCWA which again provided guaranteed benefits to the entire class of participants. RA 827-28. The 1988 agreement also altered the

contribution formula for the 1950 Benefit Plan from a system which relied substantially on a tonnage royalty to one based exclusively on hours worked. JA 343; RA 820-21. This change resulted in a dramatic reduction in total payments into the Benefit Plans, and by 1991 the deficit reported by both Benefit Plans had increased to approximately $88 million.[16] RA 1438.

Ultimately, the trustees commenced several actions seeking to enforce the "evergreen clause" against signatories to the 1978 and 1981 NBCWAs that continued to mine coal, but had not executed the 1984 or 1988 NBCWA. JA 301a. The trustees contended that these operators were obligated to continue making contributions to the Benefit Plans. While one of these actions was ultimately successful, the decision became final after Congress had already enacted the Coal Act. *Pittston*, 984 F.2d at 473-74 (decided on Feb. 2, 1993).

4. Legislative Response to the Decline of the Benefit Plans

As the financial situation of the Benefit Plans deteriorated between 1987 and 1990, the UMWA and the BCOA (including Peabody[17] and its subsidiary, EACC) sought government intervention. RA 1479-81. In 1990, in response to the crisis, then-Secretary of Labor Elizabeth Dole established an Advisory Commission on Mine Workers Retiree Health Benefits (the "Coal Commission"). JA 245a. The task of the Coal Commission was "to focus on health care issues arising from the . . . Benefit Plans and the effects of resolving these issues on the coal industry as a whole." JA 232a. The Coal Commission found that the miners and their

[16] Nearly half of that amount was attributable to the substantial decline in contributions to the 1950 Benefit Plan resulting from the change in the payment formula in the 1988 NBCWA. RA 1438 n.11.

[17] Robert H. Quenon, the President and Chief Executive Officer of Peabody, was the principal negotiator for Peabody in the 1987 transaction with Eastern, RA 2303-04, and was also a member of the Coal Commission. JA 239a.

dependents had legitimate expectations of lifetime health benefits "based on commitments made under the terms of the various [NBCWAs]." JA 340a. The Commission concluded that the financial situation resulted primarily from the increased number of "orphan" retirees whose former employers had left the BCOA, and whose benefits thus had to be paid from the 1974 Benefit Plan. JA 287a. The Coal Commission reached a general consensus that "[c]ontribution obligations should be statutorily imposed on past signatories, . . . possibly reaching back to the signatory class of 1978." JA 304a. The Commission also reviewed two specific funding proposals, including an industry-wide tax, but did not reach "consensus on the question of who should pay for orphans." JA 306a.

In response to the Commission's Report, on November 19, 1991, a bill was introduced by Senator Jay Rockefeller of West Virginia and others. It provided for an industry-wide tax on all ongoing coal operators, including those which had never employed UMWA miners, to fund retiree health benefits provided in the 1988 NBCWA.[18] The bill also proposed that, subject to certain exemptions, an additional "per beneficiary" premium payment obligation be imposed on each entity that had signed the 1978 or subsequent NBCWA agreement, for each miner, and associated beneficiary, for whom the entity was the last coal industry employer.[19]

During limited debate in the Senate, numerous Senators opposed the bill because it imposed a premium payment obligation on all coal operators, even those with no relationship to the Benefit Plans, to "subsidize the BCOA's

[18] S. 1989, 102d Cong. § 9704(g)(1), *reprinted in* 137 CONG REC. S3,020 (1992).

[19] *Id.* at § 9704(g)(1)(C), 9714, 9723(6). The substantive provisions of the bill were subsequently appended to a House of Representatives tax bill (H.R. 4210, 102d Cong. §§ 6001-03 (1992)) which was reported favorably by the Senate Finance Committee, RA 1483-84, and debated in the Senate during the period March 10 to March 13, 1992, *see* 138 CONG. REC. 3259-61 (1992).

private promises." COAL INDUS. RETIREE HEALTH BENEFIT ACT OF 1992 CONFERENCE COMM. REP., *reprinted in* 138 CONG. REC. S17,603 (1992) (attached to statement of Sen. Wallop). Notwithstanding this opposition, the bill was passed by both houses of Congress, but was subsequently vetoed by President Bush on March 20, 1992.[20]

Thereafter, these same provisions were appended to a House energy bill (H.R. 776), and reported favorably by the Senate Finance Committee on June 18, 1992.[21] The energy bill was considered in the Senate on July 29, 1992.[22] On that same date, however, Senator Rockefeller and others offered a comprehensive amendment to the bill which, among other things, deleted the industry-wide obligation.[23] This amendment also for the first time extended the payment obligation to companies, like Eastern, that had been out of the coal mining business for many years and had never signed the 1978 or any later NBCWA.[24] The amendment proposed that Congress make a finding that

> it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits . . . .[25]

In support of the proposed amendment, Senator Rockefeller explained that it would "stop the practice in which existing companies dump their responsibilities onto the companies that have faithfully kept their commitments," and rested on the "important principle that responsible companies should

[20] H.R. DOC. NO. 102-206, at 1 (1992).

[21] H.R. 776, 102d Cong. §§ 1941-43 (1992).

[22] 138 CONG. REC. S10,558, S10,825-31, S10,782 (1992).

[23] S. Amend. No. 2787, *reprinted in* 138 CONG. REC. S10,825-31 (1992).

[24] *Id.* at § 20143.

[25] *Id.* at § 20142(a)(2) (emphasis added).

bear the cost of these health benefits."[26]

The amendment was adopted, along with the proposed findings, by the full Senate without extensive debate on the same day it was proposed.[27] Thereafter, because the amendment was included in the Senate version of the energy bill but not in the House's version of H.R. 776, a conference committee was convened which adopted the Senate version without any changes.[28] The conference agreement on H.R. 776 was approved by the House on October 5 and by the Senate on October 8,[29] and was signed by President Bush on October 24, 1992.

5. The Terms of the Coal Act

The Coal Act is designed to secure funding for lifetime retiree health benefits which are "substantially the same as" benefits promised in the 1988 NBCWA. 26 U.S.C. § 9703(b)(1). The act does so through two new, private multiemployer health benefit trusts, only one of which, the UMWA Combined Benefit Fund (the "Combined Fund"), is at issue here. The Combined Fund was created by the statutory merger of the 1950 and 1974 Benefit Plans in order to provide health benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those plans as of July 20, 1992. *Id.* at §§ 9702(a), 9703(f).

To finance the Combined Fund, the Coal Act requires the assignment of the Fund's beneficiaries to particular entities that are "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry." *Id.* at § 9701(c)(7). The entity must be either a "signatory operator," which the Coal Act defines to include, *inter alia*, "a person which is or was a signatory to a coal wage agreement," *id.* at 9701(c)(1), or a "related person" to a

[26] 138 CONG. REC. S10,783 (1992).

[27] 138 CONG. REC. S10,787 (1992).

[28] 138 CONG. REC. S17,603 (statement of Sen. Wallop).

[29] H.R. REP. NO. 102-1018 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472.

signatory operator.[30]

The Coal Act makes assignments based on a three-tiered hierarchy. *Id.* at § 9706(a). A beneficiary is to be assigned, first, to the signatory operator that both signed the 1978 or later NBCWAs and most recently employed the beneficiary for two or more years. *Id.* at § 9706(a)(1). If no such entity (or related person) remains in business, the beneficiary is assigned to the signatory operator that most recently employed the beneficiary for any length of time if that operator also signed the 1978 or later NBCWA. *Id.* at § 9706(a)(2). Finally, if the beneficiary remains unassigned under the first two tiers, the beneficiary is assigned to the signatory operator that employed the beneficiary "for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." *Id.* at § 9706(a)(3). Once the assignments are made, the Coal Act authorizes the Combined Fund to assess annual health benefit and death benefit premiums[31] on each signatory operator (or related person) based on the number of former employees (and their surviving spouses and dependents) assigned to it. *Id.* at § 9704. Combined Fund beneficiaries for whom none of these assignments can be made are unassigned (or "orphan") beneficiaries, whose health benefits are funded by a transfer of interest earned on funds held by the Abandoned Mine Reclamation Fund, and, if necessary, by an additional annual premium equal to each operator's pro rata share of assigned retirees.[32] *Id.* at §§ 9704(d), 9705(b).

[30] A "related person" is defined broadly to include members of a controlled group of corporations, joint ventures, and several other groupings of companies, as well as successors in interest to any of the above. *See* 26 U.S.C. § 9701(c)(2).

[31] The premiums paid to the Combined Fund are treated as revenues of the federal government in the federal budget, and expenditures are treated as outlays. RA 1817-36.

[32] The Combined Fund's orphan benefits funding account also received a transfer of $210 million from the excess assets of the 1950 Pension Trust. *Id.*; RA 1906. The transfers from external funds have thus far sufficiently

6. Assignment of Coal Act Liabilities

As of October 1, 1994, 98,901 beneficiaries were eligible under the Coal Act for benefits from the Combined Fund. JA 118a; RA 1562. At least 70 percent of these beneficiaries were spouses or dependent survivors of deceased miners. RA 1561. As of October 1, 1994, Respondent Social Security Administration ("SSA") had assigned 71,913 of these beneficiaries to current and former signatory operators, 24,787 beneficiaries were in the "orphan" pool, and 2,201 were pending reassignment. RA 1562. Fewer than 6,740 beneficiaries were assigned to "super-reachback" operators, which are those operators that had last signed a NBCWA prior to 1978. *Id.*

Eastern, one of the super-reachback companies, was assigned over 1,400 beneficiaries as of February 1, 1993. RA 1571. Only 376 of these beneficiaries, or approximately 25 percent, were retired miners who had worked for Eastern between 1946 and 1965.[33] *Id.* The remaining 1,117 beneficiaries, or approximately 75 percent, were spouses or, in a few instances, children of coal industry retirees. *Id.* As a result of these assignments, Eastern was assessed an initial premium of $5,053,310 for a twelve-month period in 1993-94. RA 591. The statute requires that Eastern be assessed annual premiums thereafter for the remaining life of each assigned beneficiary, and Eastern has actuarially projected its total liability to be more than $100 million.[34] RA 592.

As a result of the Coal Act, the signatories to the 1988

provided for all orphan benefits and thus, the Combined Fund has not yet assessed premiums for unassigned beneficiaries. RA 1907.

[33] Of the sample of 399 assignments included in the record, approximately 17 percent of the retired miners worked for Eastern for one year or less, and a substantial number of them for as little as one month. JA 149a-184a.

[34] This estimate is supported by an uncontroverted affidavit submitted by Eastern. RA 591. Presumably relying on the brief submitted by the Combined Fund, the First Circuit noted that the "appellees vigorously contest this figure." Pet. App. A20.

NBCWA, including both Peabody and EACC, "saw a substantial reduction in their health care costs relative to what they would otherwise" have paid under the 1988 NBCWA. COMM. ON WAYS & MEANS, 104TH CONG., DEV. & IMPLEMENTATION OF THE COAL INDUS. RETIREE HEALTH BENEFIT ACT OF 1992, at 34 (Comm. Print 1995). Indeed, during fiscal year 1995, the signatories to the 1988 NBCWA—who otherwise would have been obligated to provide 100 percent of the funding—contributed only 38 percent of the income of the Combined Fund.

7. Proceedings Below

On November 1, 1993, Petitioner Eastern filed suit against the Respondents the Combined Fund, the Combined Fund's trustees, and SSA claiming that, as applied to Eastern, the Coal Act violates due process and constitutes an uncompensated taking of Eastern's property, both in violation of the Fifth Amendment.[35] JA 28a-47a. Eastern also later amended its complaint to contend that, properly interpreted, the Coal Act required that beneficiaries assigned to Eastern by SSA should have been assigned to EACC. JA 45a. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2201(a). On February 1, 1996, the district court rejected Eastern's statutory interpretation argument, and filed a Memorandum and Order on March 30, 1996. Pet. App. A28. By Order dated June 29, 1996, the district court also denied Eastern's motion for summary judgment and allowed Respondents' cross-motions on the constitutional claims, stating that it found persuasive the reasoning of several circuit courts that had addressed the constitutionality of the Coal

[35] In addition, Eastern filed a third party complaint against EACC and its controlling shareholders, Peabody and Coal Properties Corp., for indemnification or contribution with respect to any liability Eastern may have under the Coal Act. JA 15a-27a; *see* 26 U.S.C. § 9706(f)(6). The third party action was stayed pending the decision of the First Circuit. Pet. App. A27.

Act.[36] Pet. App. A26. The district court then entered judgment in favor of Respondents on July 24, 1996. Pet. App. A22.

The United States Court of Appeals for the First Circuit affirmed the district court's decision. The court first rejected Eastern's statutory argument on the ground that the language of the statute requires assignment to Eastern rather than to the subsidiary which continued its former mining operations.[37] Pet. App. A9. With respect to Eastern's constitutional claims, the court concluded that the Coal Act satisfied the Due Process Clause because Eastern had made an implicit commitment to provide lifetime health benefits to miners, and therefore Congress had acted rationally in requiring Eastern to pay for those benefits. Pet. App. A12-A14. Noting that "it would be surprising" to discover a taking violation where no due process violation exists, the court then conducted a brief, ad hoc inquiry into the nature of the economic deprivation at issue and held that Eastern had not suffered a compensable taking in violation of the Fifth Amendment. Pet. App. A19-A23.

[36] If Eastern's constitutional challenge to its Coal Act liability had been successful, the responsibility for paying for the beneficiaries' health benefits would have shifted to the signatory operators, or their related persons, that employed the miners for the next longest pre-1978 time period, *see* 26 U.S.C. § 9706 (f)(3)(A)(ii), and only if no such employers exist would a miner have been designated as an "unassigned beneficiary," or "orphan."

[37] In rejecting Eastern's statutory argument, neither the district court nor the First Circuit considered whether Eastern's interpretation of the statute was necessary to avoid "serious constitutional problems." *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

SUMMARY OF ARGUMENT

I. The Coal Act as applied to Eastern violates the Due Process Clause. Retroactive legislation has long been suspect because it poses special problems of unfairness. For that reason, under *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the retroactive aspects of legislation must be justified independently of the prospective aspects, and any such legislation requiring a person to pay for damages "unrelated to [the person's] conduct" is prohibited by the Due Process Clause. *Id.* at 17, 24-25.

In this case, Eastern played no role in causing the financial instability of the UMWA benefit plans that gave rise to the Coal Act. Eastern did not promise, nor did it cause any UMWA benefit fund to promise, lifetime health benefits to retired miners and their dependents. In fact, such benefits were first included in collective bargaining agreements long after Eastern left the industry. Moreover, by creating a substitute company before leaving the coal business which made all contributions to the benefit funds that Eastern would have made, Eastern did not deny or withdraw a revenue source from any UMWA benefit fund. Indeed, Eastern's *only* connection with any of the individuals assigned to it is that it employed them some thirty to fifty years ago, and that is not a rational basis on which to make Eastern retroactively responsible for their retiree health benefits.

Given that Eastern did not contribute to the funding problem addressed by the Coal Act, it is even more remarkable that the Coal Act reaches back to attach liability after the passage of such an astonishing number of years. While the Court has upheld retroactive periods of several years in prior cases, the Coal Act attaches new liability to relationships between Eastern and former employees that terminated as long ago as 1946, over a half century ago. This very anomaly presented by the Coal Act is reason enough to

view the statute with deep suspicion—particularly in the absence of a nexus between Eastern and the harm addressed by the statute.

In Eastern's case, then, there is no "injury attributable to the operator's business." *Turner Elkhorn*, 428 U.S. at 25, and therefore no rational basis to justify the unparalleled period of retroactivity under the Coal Act. In such circumstances, "the imposition of retroactive liability on [Eastern] for the benefit of [former] employees" is "arbitrary and irrational," and cannot be sustained under the Due Process Clause. *Cf. Connolly*, 475 U.S. at 229 (1986) (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26).

II. The Coal Act effects a taking of Eastern's property without just compensation. The essential purpose of the Takings Clause is to prevent the government from making one citizen pay to remedy a social problem that is none of his creation. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., concurring in part and dissenting in part). As applied to Eastern, the Coal Act violates this fundamental prohibition.

Each of the factors the Court has previously identified as relevant to a takings analysis supports a finding of an uncompensated taking in this case. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). First, the Coal Act directly appropriates Eastern's property to solve a social problem which Eastern did not cause. Eastern did not promise, nor did it cause any UMWA benefit fund to promise, lifetime health benefits to retired miners and their dependents. Moreover, Eastern did not deny or withdraw a revenue source from any UMWA benefit fund because it created a substitute company which made all contributions to the funds that Eastern would have made.

Second, the economic impact of the Coal Act on Eastern,

estimated to be more than $100 million, is enormous, and there is no "proportionality" between Eastern's liability and any contribution Eastern made to the social problem being addressed by the statute. There likewise is no proportional relationship between the expansive benefits mandated by the Coal Act and the relatively modest benefits provided by the UMWA plans in the 1950s and 1960s.

Finally, the Coal Act has interfered with Eastern's investment-backed expectations to an unprecedented degree. Nothing in past federal involvement in the coal industry or in past federal legislation in similar areas could have allowed Eastern to foresee the Coal Act. Thus, Eastern transferred its coal operations to EACC in 1965, and accepted a lower price for EACC's stock in 1987, with the reasonable expectation that Eastern would not bear subsequent burdens in the coal industry unrelated to its own prior conduct.

ARGUMENT

I. THE COAL ACT AS APPLIED TO EASTERN VIOLATES THE DUE PROCESS CLAUSE.

As described above, the Coal Act imposes a new and unforeseeable liability on Eastern to provide lifetime retiree health benefits to former employees whose relationship with Eastern terminated between thirty and fifty years ago. There is no sense, however, in which Eastern is responsible for causing the need for medical care in retirement. Nor did Eastern undertake or promise to provide lifetime health benefits to miners in the 1950s or early 1960s, or contribute to the financial instability of the UMWA Benefit Plans in the 1980s and early 1990s that the Coal Act was designed to address. Thus, the Coal Act imposes liability which is unparalleled in the span of its reachback period and in its lack of any causal connection to Eastern's conduct. While Congress has broad authority to adjust the burdens of economic life, this is the exceptional case in which Congress

has overstepped the bounds of its power—even under the meager rationality standard necessary to sustain all legislation. As the Court noted in a different context, "[i]t is not within our constitutional tradition to enact laws of this sort."[38] *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

A. The Due Process Clause Requires a Causal Connection Between the Harm Addressed by a Retroactive Statute and the Conduct of the Burdened Parties.

This Court has long recognized that the Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). While Congress is not prohibited from imposing new liability for conduct that has previously been completed, the Court "has never 'intimated that Congress possesses unlimited power to readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations.'" *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (quoting *Turner Elkhorn*, 428 U.S. at 16). To the contrary, the Court has stated that retroactive civil legislation[39] must be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). The "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17. More specifically, the Court noted in *Turner Elkhorn* that, when Congress imposes burdens retroactively, the rationale that the statute is designed

[38] *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 (providing a detailed history of the constitutional treatment of retroactive civil legislation).

[39] As noted by the First Circuit, there can be little argument that the Coal Act imposes retroactive liability on Eastern, in that it "attaches new legal consequences to events completed before its enactment." Pet. App. A11 (citing *Landgraf*, 511 U.S. at 270).

to regulate or punish bad conduct is normally unavailable and hence the statute must be justified on some other basis. *Id.* at 17-18 ("[W]e would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness [for intentional wrongdoing].").

In *Turner Elkhorn*, several coal mine operators challenged the facial constitutionality of the Black Lung Benefits Act of 1972, which required coal operators to provide benefits to former miners suffering from pneumoconiosis (so-called "black lung disease"). *See id.* at 8-9, 12, 14-15. The operators contended that requiring the payment of benefits for miners who left employment in the industry before the effective date of the Black Lung Benefits Act was arbitrary and irrational because it imposed retroactive liability for completed acts that were legally proper and, at least in part, unknown to be dangerous at the time they were completed. *See Turner Elkhorn*, 428 U.S. at 12, 15. Rejecting this argument, this Court held that the retroactive application of the statute served "to spread costs in a rational manner—by allocating to the operator an actual cost of his business . . . ." *Id.* at 24-25. Hence, it was not a violation of due process to "requir[e] an operator to provide compensation for a former employee's death or disability . . . arising out of employment in its mines," regardless of whether the miner left the coal industry before Congress enacted the black lung legislation. *Id.* at 19-20.

In reviewing a specific portion of the statute, this Court emphasized in *Turner Elkhorn* the importance of a causal connection between the operator's conduct and the harms addressed by the statute:

> To the extent that the [Black Lung Benefits] Act . . . is viewed as requiring compensation for damages resulting from death *unrelated to the operator's conduct*, its application to employees who terminated their

> employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity . . . The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

Id. at 24-25 (emphasis added). Because the Court found the requisite causal connection, these "difficulties" were not presented and the statute at issue was therefore not invalid under the Due Process Clause. *See id.* at 25-27.

Retroactive legislation has been justified on a basis other than a causal connection between the conduct of the burdened party and the harm addressed by the statute only in limited circumstances. Thus, the Court has approved "short and limited periods [of retroactivity] required by the practicalities of producing national legislation," *see, e.g., United States v. Darusmont*, 449 U.S. 292, 297 (1981) (per curiam); *see also Gray*, 467 U.S. at 730-31, and curative statutes where retroactivity has been reasonably necessary to address a mistake made by the immediately preceding Congress, *see, e.g., United States v. Carlton*, 512 U.S. 26, 32 (1994). The Court has never suggested that, apart from practical necessities such as these, retroactive legislation could be justified except, as in *Turner Elkhorn*, as a means to allocate the costs of a present social harm to the parties whose past conduct caused it. In fact, because the Court has declined to justify retroactive legislation on any ground of deterrence or blameworthiness for intentional misconduct, *Turner Elkhorn*, 428 U.S. at 17-18, the only rational basis for retroactively singling out a group or individual to bear the costs of solving a problem is that the group or individual contributed to the creation of the problem.

Thus, where Congress has retroactively imposed a special

tax[40] or other burden on a particular class—such as a segment of the coal industry—the constitutional standard to be applied is whether Congress could rationally have concluded that each of the parties included in the class contributed to the problem addressed by the legislation. If there is no such causal connection between the parties' conduct and the harm addressed by the statute, the retroactive aspects of the legislation cannot meet the test of due process, and hence the legislation cannot be sustained under the Due Process Clause.[41] *See Turner Elkhorn*, 428 U.S. at 24-25; *Concrete Pipe & Prods. v. Construction Laborers Pension Trust.*, 508 U.S. 602, 647 (O'Connor, J., concurring); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 349-50 (1935) (striking down, as

[40] Eastern notes that the Second and Fourth Circuits have held that Coal Act premiums are taxes because they are an involuntary financial burden imposed by the legislature acting pursuant to the police or taxing power of the government. *See LTV Steel Co. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 498 (CA2) (holding that the premiums are taxes eligible for special priority under the Bankruptcy Code), *cert. denied*, 116 S. Ct. 298 (1995); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (CA4 1996) (holding that premiums are taxes under the Declaratory Judgement Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, 26 U.S.C. § 7421).

[41] The need for a causal connection between the conduct of the burdened party and the harm addressed by a statute is also inherent in the equal protection standard applicable to the federal government under the Due Process Clause. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 769-70 (1975). The essence of the equal protection guarantee is that "those who are similarly situated must be similarly treated." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949). There can be no such reasonable or rational basis for retroactively imposing a special tax or other burden on a particular class unless each of the persons included in the class caused the harm addressed by the statute or, alternatively, will obtain a special benefit as a result of the statute. *See, e.g., United States v. Sperry*, 493 U.S. 52, 64-65 (1989) (holding retroactive imposition of user fee on group of successful claimants who had benefited from tribunal's activities was rational); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.").

violative of due process, a statute requiring railroad carriers to provide pension benefits to recently retired employees.).[42]

B. Congress Could Not Rationally Conclude that Eastern Engaged in Conduct Causing Any of the Harm Addressed by the Coal Act.

It is well settled that Congress need not articulate a legitimate purpose for its legislation so long as one can be rationally conceived. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). On the other hand, where Congress does declare its purpose, or that purpose may clearly be discerned from the nature of the statute or its legislative history, there is no room for speculation on possible other purposes. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 16 n.7 (1992) ("[H]aving themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence.") (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1958)).

In this case, the purpose of the Coal Act was to rescue the UMWA Benefit Plans from financial instability to ensure the continued delivery of health care benefits to the plans' beneficiaries. Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, § 19142(b), 106 Stat. 3037 (1992). In the face of a funding crisis, the Coal Act was intended to ensure that the Benefit Plans would be able to satisfy the defined benefit obligations contained in the 1988 NBCWA by imposing a fixed premium obligation on companies that

[42] The Court in *Turner Elkhorn* declined to overrule *Alton*, noting that *Alton* involved a statute designed to "increase or supplement a former employee's salary to meet his generalized need for funds," and hence was substantially more suspect than the statute involved in *Turner Elkhorn*. *Id.*; *see also Gray*, 467 U.S. at 733-34 (distinguishing *Alton* on ground that it involved a statute creating "pensions for employees who had been fully compensated while working for the railroads.").

purportedly had caused or contributed to the financial instability of the Plans. In order to achieve that goal, Congress concluded that retiree benefits should be funded by those "persons most responsible for plan liabilities." *Id.* at § 19142(a)(2).

Under the due process analysis, the question then becomes whether Congress rationally could have concluded that Eastern was properly includable in the category of persons responsible for the financial instability of the Plans. Under the lens of rational basis scrutiny, legislative classifications are of course allowed some "play in the joints." *Williams v. Vermont*, 472 U.S. 14, 24 n.8 (1985). But Congress exceeds permissible bounds when it imposes extraordinary retroactive liability—reaching back over a period of almost 50 years—based on innocent conduct that did not cause the problem that Congress seeks to remedy. *See Turner Elkhorn*, 428 U.S. at 24-25.

First, Congress could not rationally conclude that Eastern made or caused any UMWA benefit plan to make "promises" of lifetime health benefits. Each of the plans to which Eastern contributed prior to 1966 was a multiemployer plan requiring specified contributions; Eastern paid into the plans according to the number of tons of coal it mined, not according to the amount of money necessary to fund a particular level of benefits—as would be the case for a defined benefit plan. *See generally Connolly*, 475 U.S. at 230 (O'Connor, J., concurring). Eastern did not control the funds contributed to the plans or the benefits promised or paid by the plans. To the contrary, the plans were at all times managed by independent trustees who owed fiduciary duties to the beneficiaries of the plans, rather than to the entities who appointed them. *See generally id.* at 234; *Amax Coal Co.*, 453 U.S. at 331-32. Further, during the time that Eastern contributed to the plans, beneficiaries were specifically told by the plan trustees that benefits were revocable and not

vested. *See supra* note 8 and accompanying text. In fact, the Fund trustees frequently exercised this authority to revise eligibility requirements for benefits and to alter, rescind, and reduce particular benefits both before and after 1965. *See supra* note 9.

Thus, nothing in Eastern's conduct could have led miners to develop a reasonable expectation of lifetime retiree health benefits that would be paid by Eastern. To the contrary, as Justice O'Connor stated in *Connolly*:

> Where [a] plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plan language to the contrary, are not easily traceable to the employer's conduct.

475 U.S. at 235 (O'Connor, J., concurring).

Second, Congress could not rationally have concluded that Eastern's departure from the coal industry in 1965 contributed to the financial crisis that ultimately led to the passage of the Coal Act. Congress enacted the Coal Act because the Benefit Plans were facing a funding crisis that threatened the current ability of the Plans to meet commitments to provide retiree health benefits. According to the principal sponsor of the Coal Act, the crisis resulted from "the practice in which existing companies dump[ed] their responsibilities onto companies that have faithfully kept their commitments." 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller). Assuming that characterization was accurate,[43] it certainly does not apply to

[43] In fact, Senator Rockefeller's statement is not supported by the historical record. With the exception of the decision in *Pittston*, 984 F.2d at 475-76, courts consistently had held that the operators that had ceased maintaining separate plans or contributing to the UMWA benefit plans prior to the 1988 NBCWA had a right to do so. *See, e.g., Royal Coal Co.*, 768 F.2d at 591. Subsequently, the signatories to the 1988 NBCWA knowingly assumed the obligation to fund the benefits specified by that agreement; nothing was "dumped" on these signatories. RA 827-28.

Eastern. Rather than simply withdrawing from the business, Eastern transferred all its coal operations—including the miners formerly employed by Eastern—to a fully capitalized subsidiary, EACC, which continued to operate the same mines (and others), and which made all contributions to the plans that Eastern would have made had it remained in the mining business. *See* RA 1566. Thus, Eastern left the industry without having reduced the number of employers contributing to the UMWA funds, or having withdrawn from a separate funding obligation it had previously agreed to assume, and therefore without having contributed to the problem that prompted Congress to act.

In Eastern's case, then, there is no "injury attributable to the operator's business" that justifies the imposition of liability on Eastern. *See Turner Elkhorn*, 428 U.S. at 25. For purposes of assessing whether a rational basis supports the cost-spreading effected by the Coal Act, the relevant "conduct" is that which connects the employer to "some detriment to the employee." *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring); *Turner Elkhorn*, 428 U.S. at 18-19, 25. The relevant "detriment" or "injury" here is the financial instability of the Benefit Plans that threatened the funding for the benefits provided in the 1988 NBCWA. In this case, Eastern neither promised lifetime health benefits to miners and their dependents nor contributed to the funding crisis that led to the Coal Act. Under such circumstances, Eastern is not among those "most responsible for plan liabilities," and "the imposition of retroactive liability on [Eastern] for the benefit of [former] employees" is "arbitrary and irrational." *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26).

C. No Other Reason Justifies the Imposition of Retroactive Liability on Eastern.

The First Circuit and the Respondents have offered several bases upon which Congress could rationally have extended the Coal Act to Eastern. Each proffered rationale distorts the contours of rational basis review of retroactive legislation, and also fails to recognize the uniqueness of Eastern's situation.

First, the First Circuit concluded that, even though Eastern had made no promise of lifetime retiree health benefits, Congress had rationally distilled from the historical data an "implicit commitment" by pre-1974 signatories to furnish those benefits. Pet. App. A13. In fact, Congress did not make, nor could it have derived, any such conclusion from the historical record.[44] While Eastern, along with others, including the federal government, participated in the creation of the original UMWA welfare benefit plan, there were no agreements between 1946 and 1965 that ever mentioned or promised lifetime retiree health benefits. The 1950 NBCWA merely established a fund to provide such welfare benefits as the trustees of the fund determined in their sole discretion were desirable and affordable based on the limited contributions that were available to them. That

[44] The principal sponsor of the Coal Act, Senator Rockefeller, did make several statements indicating his belief that during the 1950 NBCWA negotiations the coal operators exacted acquiescence from the union on mine mechanization in return for promises to provide lifetime benefits. 138 CONG. REC. S10,783, S17,632 (1992). Eastern is not aware of any material in the legislative record purporting to support this statement, which is contrary to established historical fact. *See generally UMWA v. Pennington*, 381 U.S. 657, 698 (1965) (Goldberg, J., concurring) (noting that automation to maintain a higher wage standard "has been the articulated policy of the Union since 1933"); *Lewis v. Pennington*, 257 F. Supp. 815, 822 (E.D. Tenn. 1966) (stating UMWA's position that mechanization was not an issue in 1950 negotiations and that the 1950 agreement represented the only understanding between the union and operators that arose out of the negotiations), *aff'd in part and rev'd in part*, 400 F.2d 806 (CA6), *cert. denied*, 393 U.S. 983 (1968); MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS, A BIOGRAPHY 469-89 (1977) (discussing 1950 NBCWA negotiations).

arrangement cannot by itself support a reasonable conclusion that the signatory operators thereby made a commitment, or generated a reasonable expectation, that lifetime health benefits would always be available to miners and their dependents, regardless of whether the cost of such benefits exceeded the amount of contributions that were promised.[45]

While contractual terms do not limit Congress's authority to legislate, *see, e.g., Connolly*, 475 U.S. at 223-24, those terms are the principal determinants of the reasonable expectations of miners employed by Eastern. To suggest that such expectations were implicitly supported in the early agreements (despite the terms of those agreements and the trustees' adjustment of benefit levels to comport with available funds) is to rewrite history. The Court has never held that such a fiction can determine important constitutional rights. *See, e.g., Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("Whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . ."); *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts have ceased to exist.").

Second, the First Circuit and the Respondents considered it significant that from 1966 to 1987 Eastern received dividends from its then wholly-owned subsidiary, EACC,

[45] Because there is no factual support for the First Circuit's "implicit commitment" conclusion, the court's reliance on other courts of appeals to support its position is misplaced. *See* Pet. App. A13 (citing *Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 525 (CA6 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 694 (CA3 1996); *Devon, Inc. v. Shalala*, 75 F.3d 1114, 1129 (CA7), *cert. denied*, 117 S. Ct. 50 (1996). "[N]o amount of repetition of historical errors in judicial opinions can make the errors true." *See Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

which signed the 1974 and later NBCWAs. Pet. App. A15. This argument entirely misconceives the basis for Eastern's liability under the Coal Act. Eastern has been assigned liability because it employed miners between 1946 and 1965, and not as the parent or a "related person" to EACC.[46] RA 2319-23. The amount of the liability assigned to Eastern would be precisely the same even if Eastern had sold its coal operations in 1965 to an unrelated third party. Moreover, while Eastern did earn dividends on its investment in EACC, the dividend payments did not contribute to the financial crisis affecting the Benefit Plans, nor did they compromise EACC's long term economic viability or threaten its status as a contributor to the Benefit Plans. In fact, between 1966 and 1987, EACC contributed over $233 million to the Plans—more than double the amount realized by Eastern in dividends. RA 2626.

Third, the Combined Fund and the government have argued that the mere fact that a coal company employed miners, and thus "profited" from their labor, is sufficient to justify retroactive liability. *See also Blue Diamond*, 79 F.3d at 523. This conclusion reflects a subtle, but nonetheless fundamental, misunderstanding. *Turner Elkhorn* held that the Black Lung Benefits Act, which imposed retroactive liability to fund benefits for miners with black lung disease, justifiably spread the costs of the injuries redressed by that statute to "those who have profited from the fruits of [the miners'] labor." 428 U.S. at 18. The Court emphasized that this cost-spreading was justified only because black lung disease was an injury sustained as a consequence of the miners' employment, and thus the statute "allocate[d] to the operator an actual cost of his business, the *avoidance* of which might be thought to have enlarged the operator's profits." *Id.* at 24-25 (emphasis added). This case is fundamentally different. Unlike the situation in *Turner Elkhorn*, the Coal Act responds to the

[46] *See* 26 U.S.C. §§ 9701(c), 9706(a).

"generalized need" of the miners for retiree health benefits—a need that is unrelated to the work performed by the miners for Eastern. *See id.* at 25. Moreover, the majority of the beneficiaries (spouses and dependents) never worked in the coal mines at all, and their health care needs cannot be said to spring from employment in the coal industry. In any event, even if Eastern is responsible for some "costs" presently being borne by the Combined Fund, Eastern has not "avoided" those costs because it established a subsidiary which continued to fund the Benefit Plans.[47]

Finally, the Respondents have argued that the retroactive liability imposed by the Coal Act is justified based on an employer's "past conduct of providing service credits to its former UMWA employees [which] directly contributed to the Combined Fund's ultimate liabilities." *See Blue Diamond*, 79 F.3d at 523. This argument, however, mistakenly relies on this Court's reference to "service credits" in *Concrete Pipe*, 508 U.S. at 638, without attention to the context in which the reference was made. The Court in *Concrete Pipe* was addressing the claim that the Multiemployer Pension Plan Amendments Act (the "MPPAA") violated the Due Process Clause because it irrationally assigned liability for unfunded pension benefits to employers contemplating a present withdrawal from a defined benefit pension plan they had voluntarily joined. *Id.* at 637. The Court rejected that argument because the employer had contributed to the plan's "probable liabilities" by providing employees with service credits toward vested pension rights, and the employer had understood, at the time it entered the plan, that it might be responsible for greater liability than was

[47] Similar reasoning distinguishes this case from *United States v. Monsanto Co.*, 858 F.2d 160 (CA4 1988), which upheld retroactive liability under the Comprehensive Environmental Response, Compensation, and Liability Act. *See id.* at 174. Plainly, a company that causes pollution without taking steps to remedy it is avoiding a cost of its business, and retroactive liability for that cost would thus fall squarely within the principles advocated here. *See id.*

attributable to its own employees. *Id.* at 638, 640. In doing so, the Court specifically noted that the company "had no complaint that the MPPAA had been retroactively applied by predicating liability on a withdrawal decision made before the passage of the statute." 508 U.S. at 636. In this case, unlike the employer in *Concrete Pipe*, Eastern made no contribution to the "probable liability" of any UMWA plan for lifetime retiree health benefits, and ceased its participation in the UMWA Plans decades before the passage of the Coal Act.

D. The Coal Act as Applied to Eastern Is an Unprecedented Exercise of Arbitrary Government Power.

Given that Eastern did not contribute to the funding problem addressed by the Coal Act, it is even more remarkable that the Coal Act reaches back to attach liability after the passage of such an astonishing number of years. While the Court has upheld retroactive periods of several years in prior cases,[48] the Coal Act attaches new liability to relationships between Eastern and former employees that terminated as long ago as 1946, over a half century ago. *See* JA 169a, 173a. It is eminently reasonable for an employer like Eastern to believe that finality and repose have long since settled over such relationships. Moreover, Eastern reorganized its corporate structure more than three decades ago, and formed a subsidiary to stand in the shoes of its former Coal Division. Then, a decade ago, Eastern sold the stock of that subsidiary to the largest coal operator in the United States, and the price that Eastern accepted for the stock reflected the reasonable assumption that EACC would fulfill its own obligations, including those to the Benefit Plans. RA 216. Eastern could hardly have anticipated that

[48] *See, e.g., Carlton*, 512 U.S. at 33, 35 (upholding an act retroactively increasing the estate tax rate for prior year); *United States v. Heinszen*, 206 U.S. 370 (1907) (upholding an act ratifying the otherwise unconstitutional collection of tariffs over the preceding eight year period).

Congress would enact legislation that would shift a substantial portion of the obligation voluntarily assumed by current coal operators, such as EACC, to former coal operators such as Eastern.

Under these unique circumstances, the Coal Act is a potent example of the capacity of retroactive legislation to produce "problems of unfairness that are more serious than those posed by prospective legislation, because [retroactive legislation] can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down retroactive state law changing employer's pension plan obligations because it upset settled expectations in violation of the Contract Clause). The very anomaly presented by the Coal Act is reason enough to view the statute with deep suspicion—at least in the absence of a tight causal nexus between the harm addressed by the statute and the persons singled out to provide a remedy for that harm. Given the absence of any such nexus to Eastern, the Coal Act is not rational legislation—it is an exercise in sheer power and expediency. As such, it cannot be sustained under the Due Process Clause of the Fifth Amendment. *See also Hustado v. California*, 110 U.S. 516, 527 (1884) (noting that the Due Process Clause "protect the citizen against all mere acts of power.") (quoting *Westervelt v. Gregg*, 12 N.Y. 202, 212 (1854)).

For the foregoing reasons, the Coal Act as applied to Eastern by SSA violates the Due Process Clause of the Fifth Amendment.

II. THE COAL ACT, AS APPLIED TO EASTERN, EFFECTS A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without

just compensation." U.S. CONST. amend. V. Because the Coal Act subjects Eastern to a staggering assessment that bears no rational relationship to Eastern's experience with the UMWA benefit plans in order to solve a problem that Eastern played no part in creating, application of the Coal Act to Eastern effects a taking of Eastern's property without just compensation, in violation of the Fifth Amendment.[49]

The inquiry under the Takings Clause is guided by the "canonical" principle that the government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*, 438 U.S. at 123; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). The essence of the Takings Clause "is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." *Pennell*, 485 U.S. at 23 (Scalia, J., concurring in part and dissenting in part).

Although this essential principle is clear, the Court has recognized that applying the Takings Clause to particular situations requires a factual assessment guided by several levels

[49] Relying on dicta in *Connolly* suggesting that "it would be surprising" to "discover now" a takings violation where no due process violation had been found, *see Connolly*, 475 U.S. at 223, the First Circuit erroneously presumed that its finding in the due process context all but necessitated its rejection of Eastern's Takings Clause claim. Pet. App. A19. However, "there is no reason to believe . . . [that] the standards for takings challenges, due process challenges, and equal protection challenges are identical," *Nollan*, 483 U.S. at 834 n.3; *cf.* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 n.40 (1988); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980).

of inquiry.[50] *Penn Central*, 438 U.S. at 124. The threshold inquiry examines the nature or character of the governmental action, including whether a permanent appropriation has occurred, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), and whether a causal nexus exists between the appropriation and the harm that the government seeks to remedy. *See Dolan*, 114 S. Ct. at 2317; *Nollan*, 483 U.S. at 837-38; Jan G. Laitos, *Takings & Causation*, 5 WM. & MARY BILL RTS. J. 359, 369-372 (1997). Assuming there is a nexus, the analysis typically proceeds to examine the economic impact of the exaction, including whether it is proportional to the property owner's role in causing the social ill addressed by the regulation. *See Penn Central*, 438 U.S. at 124; *see also Dolan*, 114 S. Ct. at 2317; *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 225-26. Finally, it is sometimes appropriate to examine other factors which may justify the uncompensated taking of property by the government, and this portion of the inquiry often centers on whether the property owner should have foreseen the government's interference with its reasonable investment-backed expectations. *See, e.g., Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 226; *cf. Lucas*, 505 U.S. at 1030-31.

Application of these inquiries to the "circumstances of [this] particular case," *Connolly*, 475 U.S. at 224, demonstrates that the Coal Act as applied to Eastern effects an uncompensated taking.

A. As Applied to Eastern, the Coal Act Constitutes a Direct Appropriation of Property Unrelated to Any Harm Caused by Eastern.

The Coal Act effects a permanent appropriation of

[50] The absence of any single line of analysis applicable in all takings cases is caused, at least in part, by the fact that the Takings Clause can apply both to direct appropriations of property, as occurred in this case, or, alternatively, to government regulation of the use of property. *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-1019 (1992).

Eastern's property to remedy a social problem—the financial instability of the UMWA benefit plans—that Eastern played no role in causing. *See, e.g., Loretto*, 458 U.S. at 426; *see also Webb's Fabulous Pharmacies*, 449 U.S. at 163-64. Unlike the situation facing the employers in *Connolly* and *Concrete Pipe*, *see* discussion *infra*, Eastern is not a member of a multiemployer plan whose withdrawal opportunities have been circumscribed by Congress. *See Concrete Pipe*, 508 U.S. at 643; *Connolly*, 475 U.S. at 225. Rather, as applied to Eastern, the Coal Act imposes an involuntary tax or premium obligation upon conduct completed thirty to fifty years ago. Such a permanent appropriation of property requires compensation unless it is based upon and proportional to some connection or "nexus" between the property owner's conduct and the social ill which the appropriation seeks to address. Any contrary rule would grant to government a virtually unchecked power to "load[] upon one [company] more than [its] just share of the burdens of government." *Monongahela*, 148 U.S. at 325; *see Dolan*, 114 S. Ct. at 2317-19; *Nollan*, 483 U.S. at 837; *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *see also Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring in part and dissenting in part). *See generally* Laitos, *supra*, at 369-72.

Recent decisions confirm that the nexus requirement is an essential element of takings analysis. Thus, in *Nollan*, 483 U.S. at 837, the Court held that the California Coastal Commission violated the Takings Clause by conditioning the grant of a building permit to the owners of beachfront property on their grant to the public of a lateral easement across the property. In reaching this result, the Court noted that the condition imposed by the Commission would not alleviate any problems that would be caused by the owners' proposed construction. *Id.* In the absence of any such connection or "nexus" between the exaction sought by the Commission and the problem to be created by the owners'

proposed use of their property, the Court concluded, the only purpose of the condition was to compel the owners alone to contribute toward the achievement of a general social good (public access to beaches). This, the Court held, was impermissible under the Takings Clause without compensation, and therefore the Commission could not condition the grant of the permit on the uncompensated taking. *Id.* at 841-42.

More recently, in *Dolan*, 114 S. Ct. at 2321-22, the Court held that the Planning Commission of the City of Tigard, Oregon, violated the Takings Clause by conditioning approval of a permit application on an insufficiently related exaction. In *Dolan*, the owner of an electric supply store sought to expand the store and pave its parking lot. *Id.* at 2313-14. In exchange for the permit, the Commission required a dedication of portions of the owner's land (i) for a public greenway along a creek in the area to minimize flooding that would be exacerbated by the increase in impervious surfaces associated with the proposed development and (ii) for a pedestrian/bicycle pathway intended to relieve traffic congestion that would be exacerbated by the development. *Id.* In concluding that the exaction effected a taking, the Court first noted that the "nexus" requirement identified in *Nollan* was satisfied because the proposed development would increase impervious surfaces and accompanying flooding in the area, and would also likely increase traffic in the area. *Id.* at 2317-18. The Court held, however, that the conditions were nonetheless invalid under the Takings Clause because the Commission had failed to make any determination or showing that "the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

Although *Nollan* and *Dolan* directly address the limits to government's ability to condition granting a benefit on the relinquishment of a constitutional right, the cases illuminate

the appropriate analysis for all direct appropriation cases. *See* Laitos, *supra*, at 371. Namely, when the government seeks to appropriate the private property of an individual for a public purpose, the Takings Clause requires that the government compensate the property owner unless there is some nexus between the property owner's conduct and the social ill addressed by the appropriation. *See, e.g., Pennell*, 485 U.S. at 21 (Scalia, J., concurring in part and dissenting in part).

The Takings Clause analysis is not different in this case because money rather than real property is the subject of the government exaction. In *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64, for example, addressing a claim that a county's retention of interest earned on an interpleader account violated the Takings Clause, this Court's takings analysis began (and ended) with the question whether there was a "nexus" between the exaction and the "harm" caused to the county by managing the interpleader account on behalf of the creditors. Specifically, the Court held that, in light of the fact that a separate toll was exacted from the interpleader account to pay for county services in managing the account, the further exaction of the interest earned on the account "is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." *Id.* at 163. Analogizing to a land appropriation case, *United States v. Causby*, 328 U.S. 256 (1946), the Court held that the toll was a taking because it "had the practical effect of appropriating for the county the value of the use of the [interpleader] fund."[51] 449 U.S. at 164; *see also Sperry*, 493 U.S. at 59-62 (applying takings analysis to percentage user fee imposed on successful claimants before Iran-United States claims tribunal); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,

[51] Thus, this nexus requirement limits governmental appropriations of money even though money, because of its fungible nature, has been treated different from real and personal property in other contexts, *see Sperry*, 493 U.S. at 62 n.9. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring in part and dissenting in part).

1003-1004 (1984) (trade secrets); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (nonpossessory, non-purchase money liens on personal property); *Armstrong*, 364 U.S. at 44 (materialman's lien).

Even in recent decisions concluding that an uncompensated taking had not occurred, the Court's decisions have been consistent with the necessity of a threshold "nexus" requirement under the Takings Clause. In *Connolly* and *Concrete Pipe*, for example, the Court addressed takings challenges to the MPPAA—a regulatory scheme governing liability upon withdrawal from a pension plan where the "nexus" with the conduct being regulated was readily apparent. The statute was aimed at solving the financial instability caused by employers withdrawing from multiemployer pension plans and leaving unfunded their portions of the plans' vested liabilities. *See Concrete Pipe*, 508 U.S. at 643-44; *Connolly*, 475 U.S. at 225-26. In upholding the MPPAA in each case, the Court followed a takings analysis that implicitly acknowledged the threshold "causation" requirement applied in *Nollan* and *Dolan*.[52] *See Concrete Pipe*, 508 U.S. at 643-46; *Connolly*, 475 U.S. at 225-28; *cf. Pennell*, 485 U.S. at 20-22 (Scalia, J., concurring in part and dissenting in part) (applying "nexus" requirement to a rent regulation ordinance that allowed a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord).

Like the situations in *Nollan* and *Dolan* (and in sharp contrast to those in *Connolly* and *Concrete Pipe*), nothing in

[52] Other portions of the Coal Act, not at issue in this case, are similar to the MPPAA, in that they regulate current or prospective withdrawals by signatories to the 1988 NBCWA from a benefit fund in which they were participants when the Coal Act became law. *See* 26 U.S.C. § 9712(d)(1). While the analysis in *Connolly* and *Concrete Pipe* is fully applicable to such regulation, the portion of the Coal Act challenged in this case is instead a direct appropriation of property which neither bears a relation to past conduct nor regulates current or future conduct.

Eastern's conduct could have led Congress rationally to conclude that Eastern contributed to the financial problems of the Benefit Plans that resulted in the Coal Act. Beneficiaries of the only benefit funds to which Eastern contributed were specifically told that the benefits provided were revocable and not vested. *See supra* notes 7-8, and accompanying text. The 1950 W&R Fund trustees, whom Eastern did not control, had the sole authority to set the level of benefits and frequently exercised that authority to alter, rescind, and reduce particular benefits. *See supra* note 9, and accompanying text. Eastern's sole obligation, which it fully met, was to pay a fixed per ton contribution to the 1950 W&R Fund. RA 2626. By 1965, when Eastern's Coal Division completed its transfer of assets and liabilities to EACC, there were no vested health benefits for miners, let alone their dependents. To the extent that beneficiaries developed an expectation that they were entitled to lifetime health benefits, it cannot be traced to Eastern. That expectation, if it exists at all, is solely the result of the commitment by the signatories to successive NBCWAs after 1974 to finance those plans at designated benefit levels. Moreover, unlike the employers in *Connolly* and *Concrete Pipe*, Eastern did not withdraw from the industry in a manner that deprived any UMWA benefit plan of a previous, dependable funding source. Rather, Eastern's subsidiary took over all of Eastern's mining operations, continued to employ UMWA miners, and continued to make the contributions to the 1950 W&R Fund that Eastern itself would have made.[53] RA 1566, 2626.

[53] It should be noted that, as applied to Eastern, the Coal Act also lacks any "average reciprocity of advantage," a feature that "has been recognized as a justification of various laws." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *cf. Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987). Because Eastern has left the coal business completely, and none of its remaining subsidiaries is coal-related, Eastern gains no legal or economic benefit in exchange for the considerable contribution that the Coal Act requires Eastern to make to the Combined Fund.

Thus, an unprecedented thirty years after leaving the coal industry, the Coal Act essentially forces Eastern to cede its property to solve a social problem—the insolvency of the Benefit Plans as they existed in 1991-92—that it had no role in creating. This essential nature of the Coal Act as applied to Eastern is sufficient by itself to establish a violation of the Takings Clause, regardless of the consideration of any other circumstances. *See Dolan*, 114 S. Ct. at 2317; *Nollan*, 483 U.S. at 837; *Pennell*, 485 U.S. at 21 (Scalia, J., concurring in part and dissenting in part).

B. The Economic Impact of the Coal Act Is "Out of All Proportion" to Eastern's Experience with the UMWA Benefit Plans.

Assuming that some nexus can be divined between the financial crisis of the Benefit Plans and Eastern's conduct thirty to fifty years ago, the next level of inquiry in the takings analysis involves examination of the economic impact of the liability on Eastern. The impact of the Coal Act on Eastern is currently estimated at more than $100 million. However, the size of the liability alone, even though great, does not end the inquiry. For Takings Clause purposes, the most relevant question is whether Eastern's liability is "out of proportion to" Eastern's contribution to the problem which the Coal Act purports to address. This proportionality inquiry does not require a "precise mathematical calculation," *Dolan*, 114 S. Ct. at 2319; instead, the inquiry is guided by the principle that no one should be forced to shoulder more than her "just share" of the costs of government. *See Monongahela*, 148 U.S. at 325. Thus, in *Dolan*, it was necessary that the exactions demanded by the Commission's permit condition be in "rough proportion" to the projected impact of the owner's proposed land use. *Dolan*, 114 S. Ct. at 2319. Similarly, in the regulatory context presented in *Connolly* and *Concrete Pipe*, the Court upheld the MPPAA largely because it imposed liability *only* on employers that withdrew from

multiemployer plans, and *only* to the extent necessary to avoid the underfunding *caused* by each such withdrawal. *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 225-26.

In this case, the liability assessed against Eastern is not proportional to any contribution it made to the financial instability of the Benefit Plans. As described above, Eastern neither increased the unfunded liabilities of any UMWA benefit plan to which it contributed nor deprived any plan of any funding source upon which it previously had relied. Nor should Eastern's liability be considered "proportional," as the First Circuit concluded, simply because the Coal Act assigns liability to Eastern in relation to the number of its former employees. Pet. App. A21. To be sure, there is a convenient symmetry in the assignment to each signatory of its own former employees. The measure of proportionality under the Takings Clause, however, is between the *size* of Eastern's liability and the extent of any *contribution* by Eastern to the problem addressed by the statute. *See Dolan*, 114 S. Ct. 2319. Even if Eastern somehow had contributed to the desire of its employees for retiree health benefits, there is no "rough proportionality" between the relatively modest vision of retiree benefits likely in the 1950s and early 1960s and the considerably more expansive benefits mandated by the Coal Act (especially where Eastern has been assigned miners who worked for Eastern for only a very brief period of time).

Indeed, not only does the Coal Act provide benefits that were unknown in the years that Eastern was a signatory, it extends those benefits to a wider range of beneficiaries than under the 1950 W&R Fund. One particular example stands out. The Coal Act provides lifetime health benefits to spouses of miners. In fact, this group collectively comprises a substantial portion of all beneficiaries of the Combined

Fund assigned to Eastern.[34] Yet, the trustees of the 1950 W&R Fund, to which Eastern made contributions, extended health benefits to the spouse of a miner for only a short period following the miner's death. *See supra* note 7, and accompanying text. Eastern does not quarrel with the social desirability of providing lifetime health benefits to miners' spouses in the 1990s. However, it is a fiction to suggest that this class of beneficiaries could have had an expectation of *lifetime* health benefits, particularly because such benefits were not mentioned until the 1974 NBCWA. *See Robinson*, 455 U.S. at 567; *see also supra* note 9. With respect to the beneficiaries assigned to Eastern, therefore, there is no "rough proportionality" between the benefits provided by the Coal Act and Eastern's conduct. *See Dolan*, 114 S. Ct. at 2319. Likewise, Eastern's potential liability for "orphan" beneficiaries bears no reasonable relation to Eastern's conduct. *See. id.* The "orphan" miners, by definition, were not employed by Eastern at all, and in fact may not have worked in the coal industry until after Eastern's departure more than thirty years ago. Thus, had Congress considered the issue, it could not have rationally determined that the liability imposed on Eastern by the Coal Act was proportional to any contribution by Eastern to the funding problems facing the Benefit Plans.

Thus, the proportionality inquiry leads only to the conclusion that the Coal Act as applied to Eastern does not impose a liability on Eastern which is even in rough proportion to Eastern's experience with the plan.

C. The Coal Act Drastically Upsets Eastern's Investment-Backed Expectations.

It remains to consider whether the appropriation of

[34] As set forth above, of the 1,493 beneficiaries assigned and billed to Eastern as of February 1, 1993, only 376 (25%) were actual coal industry retirees. RA 1571. The remaining 1,117 beneficiaries (75%) were spouses or dependent children of such coal industry retirees. *Id.; cf.* RA 1561.

Eastern's property can be justified because the liability imposed by the Coal Act was, as the First Circuit concluded, foreseeable. The First Circuit held that Eastern had "contributed" to miners' expectations in an industry with a pattern of federal involvement, and therefore "Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Pet. App. A22. In doing so, the court of appeals fashioned a standard for the examination of "investment-backed expectations" that incorrectly assumes that a general history of federal involvement in an industry is sufficient to justify virtually any appropriation by the government. *See Concrete Pipe*, 508 U.S. at 648-49 (O'Connor, J., concurring).

As shown below, the liability imposed by the Coal Act was entirely unforeseeable, whether judged from the perspective of 1965, when Eastern left the coal business, or even from the perspective of 1987, when Eastern sold EACC to Peabody. As a result, the Coal Act interferes with Eastern's reasonable investment-backed expectations to an unprecedented degree.

1. Eastern's Expectations in 1965

At the time Eastern transferred its coal business to EACC in 1965, Eastern reasonably expected that it would have no further liability to the UMWA plans, and indeed that EACC would stand in the shoes of Eastern for all "financing, liability and operational purposes," including both known and unknown liabilities. RA 214; *see also* RA 203, 209, 263. This independent responsibility of EACC for past and future liabilities was of "great practical importance" to Eastern. RA 214. As a Massachusetts business trust, Eastern understood that its shareholders could be liable for unsatisfied debts of the

trust.[55] In order to attract capital, therefore, it became necessary no later than the 1960s for Eastern to confine operational liabilities to its subsidiaries. RA 214-15. That Eastern's expectations of being insulated from future unknown coal-related liabilities were reasonable is confirmed by the fact that when the Black Lung Benefits Act imposed retroactive liability on coal companies, EACC handled and, when necessary, paid the claims, even with respect to miners who had retired before EACC was created. *See supra* note 14.

Moreover, the NBCWAs reflected the expectation that, once each of the contracts had expired, the operator would have no further contribution obligations. While the terms of the NBCWAs do not themselves constrain Congress's authority to legislate, *see, e.g.*, *Connolly*, 475 U.S. at 223-24, they do present the best available indicator of the parties' contemporaneous expectations. The clarity with which the NBCWAs stated the non-vested and non-guaranteed nature of the benefits provided would have led a reasonable person at the time to expect that the expiration of a NBCWA would mean the end of any obligation arising therefrom. Moreover, during the entire period that Eastern was a signatory to the agreements between 1947 and 1964, there was no existing statute which suggested that mere participation in a specified contribution plan would obligate Eastern to continue to provide benefits to its miners (and their dependents) for life.

The First Circuit was of the view that federal intervention to avoid instability in the coal industry was foreseeable given

[55] The shareholders of a Massachusetts business trust face potential liability every time the trust enters into a contract, and are especially susceptible to liabilities associated with torts or statutory violations of the trust. *See McCarthy v. Parker*, 243 Mass. 465, 467, 138 N.E. 8, 8 (1923) (assuming that the shareholders of a business trust are liable as partners to all creditors who did not contract to look only to the funds of the trust); MASSACHUSETTS CORPORATION LAW & PRACTICE § 17.6, at 559-60 (Richard W. Southgate & Donald W. Glazer eds., 1997) (noting that for this reason trusts often conduct their actual operations through wholly-owned subsidiaries so as to provide an additional level of protection).

the history of federal takeovers of mines and federal intervention in labor disputes. Pet. App. A22; *see also Blue Diamond*, 79 F.3d at 525; *Davon*, 75 F.3d at 1129. Although federal intervention in the coal industry may have been foreseeable, the unprecedented reachback liability and expansive intervention embodied in the Coal Act was not.[56] To the contrary, a company that had transferred its assets and liabilities to a well capitalized subsidiary would not anticipate that it would ever bear subsequent burdens not related to its own prior conduct. Accordingly, viewed from Eastern's perspective in 1965, the Coal Act as interpreted by SSA interferes drastically with Eastern's reasonable investment-backed expectations.[57]

[56] This conclusion is buttressed by the fact that, while the federal government had indeed taken over coal mines at several points during and immediately after World War II, those actions often resulted in successful Takings Clause claims by the coal companies. For example, the Supreme Court held in *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (plurality opinion), that a five-month takeover of coal mines during 1943 was "a 'taking' requiring the Government to pay" the coal companies. *Id.* at 119 (Reed, J., concurring). Thus, federal intervention may have been foreseeable in 1965 based on past events, but the legal fallout from those events would have led coal companies to expect that they would be compensated for losses caused by such intervention.

[57] That the Coal Act upsets Eastern's reasonable investment-backed expectations is further highlighted by its dependence on a fortuitous business judgment made a generation ago. The reorganization completed by Eastern in 1965 "pushed down" the Coal Division to EACC as a wholly-owned subsidiary, and thereby detached the business operation which had employed the miners from the formal entity within which the business had operated. Had Eastern foreseen the Coal Act's assignment scheme, it could have elected another form of reorganization which would have maintained the connection between the business operation and the entity. For example, Eastern could have "pushed up" the non-coal operations to a newly formed parent entity, and left the coal operations in Eastern Gas and Fuel as a subsidiary of the new parent. With the sale of the coal subsidiary to Peabody in 1987, the parent would have shed both the entity and the business operation which ultimately produced the Coal Act liability. As a result, the present Eastern family of companies would have avoided any liability under the Coal Act. *See* 26 U.S.C. § 9706.

2. Eastern's Expectations in 1987

Moreover, in early 1987, Eastern had been out of the coal business for over 20 years, but Eastern's independent subsidiary, EACC, then was (and still is) an active coal mining concern. Since EACC was a well capitalized company, Eastern surely could not have expected that it would have any share of EACC's liability after transferring all of EACC's stock to Peabody in 1987. Eastern contemplated, and pointed out to EACC and Peabody during the negotiations, that any liabilities would remain with EACC. RA 216-17. Indeed, the price Eastern received in selling EACC reflected the fact that EACC had previously taken on all of Eastern's known and unknown coal-related liabilities. *Id.* Consequently, if Eastern had considered the possibility of federal intervention in some impending funding crisis, Eastern could not reasonably have foreseen a statute that would impose liability on it. The federal government has only a limited history of regulation of the provision of medical benefits by private benefit plans,[58] and even in the pension arena where ERISA regulates withdrawal liability, the sale of EACC to Peabody would not have resulted in any liability to Eastern.[59] Thus, whether viewed from Eastern's perspective in 1965 or 1987, the Coal Act interferes in an unforeseeable manner with Eastern's investment-backed expectations, so this factor also weighs in favor of finding a taking.

In sum, consideration of the nature of the government action, the lack of proportionality between Eastern's liability

[58] GEN. ACCOUNTING OFFICE, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE No. GAO/HRD-90-92, at 3 (Mar. 1990).

[59] Under MPPAA, the sale of EACC to Peabody would not have constituted a "withdrawal" for purposes of triggering withdrawal liability. *See* 29 U.S.C. § 1301(b)(1). Eastern and EACC would have been treated as a single employer for purposes of withdrawal liability under ERISA's "common control" test. *Id.*

and its experience with the UMWA funds, and the drastic interference that the Coal Act has wrought on Eastern's reasonable investment-backed expectations leads to the conclusion that the Coal Act's assessment of liability on Eastern effects a taking of Eastern's property without just compensation, in violation of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the Court should declare that the Coal Act, as applied to Eastern, violates the Due Process and Takings Clauses of the Fifth Amendment, and the judgment of the Court of Appeals accordingly must be reversed.

Respectfully submitted,

JOHN T. MONTGOMERY
Counsel of Record
JOHN H. MASON
ROBERT DANIEL O'CONNOR
DALILA ARGAEZ WENDLANDT
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000

L. WILLIAM LAW
SARA JOHNSON MYERS
EASTERN ENTERPRISES
9 Riverside Road
Weston, MA 02193
(617) 647-2300

Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES, PETITIONER

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SUSHMA SONI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, as applied to petitioner, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment.

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Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992* (1995) 11
Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* (Comm. Print 1993) 3, 5, 6, 8, 11, 13
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U.S. Coal Mines Admin., *A Medical Survey of the Bituminous-Coal Industry* (1947) 3, 4

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 110 F.3d 150. The opinion of the district court granting summary judgment in favor of respondents (Pet. App. A25-A27) is unreported. An earlier opinion of the district court denying petitioner's motion for summary judgment and denying third-party defendant Peabody Holding Company's motion to dismiss (Pet. App. A28-A38) is reported at 942 F. Supp. 684.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1997. The petition for a writ of certiorari was filed on July 3, 1997, and was granted on October 20, 1997. 118 S. Ct. 334. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, is set forth in relevant part at Pet. App. A39-A64.

STATEMENT

1. The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, was enacted in response to a crisis in health care costs in the coal industry. The Act had its origins in a series of collective bargaining agreements between coal mine operators and the United Mine Workers of America (UMWA). Those contracts, known as National Bituminous Coal Wage Agreements (NBCWAs), created multi-employer benefit plans that for more than 40 years provided health care benefits to active and retired miners and to their dependents. The Coal Act was enacted to preserve the health benefits that had been available to retired coal miners and their dependents before the Act was passed. See Pet. App. A3.

The health care benefits of coal miners, their dependents, and their survivors have been a central issue in labor relations in the coal industry for many years, and the federal government played a formative role in the postwar settlement of that issue. Immediately after World War II, the UMWA made creation of a health and retirement fund a cornerstone of its collective bargaining demands. After unsuccessful negotiations over health and retirement benefits led to a nationwide coal strike in 1946, the federal

government nationalized the coal industry. The government and the UMWA subsequently executed at the White House a contract, known as the Krug-Lewis Agreement, which established a "Medical and Hospital Fund" for health benefits for miners and their dependents, to be administered by union-appointed trustees. See *United States* v. *United Mine Workers*, 330 U.S. 258, 262-263, 286 (1947). The Krug-Lewis Agreement also committed the federal government to undertaking a "comprehensive survey and study" of medical facilities available to coal miners, in order to "determine the character and scope of improvements which should be made to provide the mine workers of the Nation with medical * * * facilities conforming to recognized American standards."[1]

That study, known as the Boone Commission Report, disclosed "many serious deficiencies in the lives of the people employed in bituminous-coal mining," and emphasized that "corrective action [was] more imperative than ever before." U.S. Coal Mines Admin., *A Medical Survey of the Bituminous-Coal Industry* ix (1947). The Report found that, in coal-mining areas, rates of infant mortality were significantly above those in other areas, *id.* at 76-77; that measures to control and cure tuberculosis in coal-mining areas were insufficient, *id.* at 80; that local and state public health services were not reaching coal-mining

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[1] See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 80-82 (1991) (reprinting Krug-Lewis Agreement) (hereafter *Senate Coal Commission Hearing*); J. Woodrum & L. Rothman, *Proposals for Funding United Mine Workers of America Retiree Health Benefits: The Constitutional Dimensions*, 93 W. Va. L. Rev. 633, 639-640 (1991); J.A. 262a-263a (Coal Commission Report); Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 101-102 (Comm. Print 1993) (hereafter *Financing Orphan Retiree Benefits*).

communities, *id.* at 86, 88; that "there has not been a comprehensive program, or even any program at all for rehabilitating the disabled within the bituminous-coal industry," *id.* at 112; that physicians had failed to employ measures to prevent occupational diseases in miners, *id.* at 114; that at a majority of the mines, medical facilities "range[d] from adequate to very poor," *id.* at 130-131; and that three-fourths of hospital facilities available to miners and their families were inadequate with regard to at least one major function, such as "[s]urgical rooms, delivery rooms, labor rooms and nurseries, clinical laboratories, and X-ray facilities," *id.* at 191. The Boone Commission Report recommended that a system based on sound actuarial principles be established "to provide comprehensive medical services to coal-mine employees and their dependents." *Id.* at 227.[2]

In 1947, after the mines were returned to private control, the UMWA and the Bituminous Coal Operators Association (BCOA) entered into a NBCWA, which created a multi-employer health and welfare fund covering both pension and health benefits, financed by employer contributions based on coal production, and administered by three trustees. Continued disagreement and labor unrest over financing of benefits,[3] however, led to another strike and to the appointment of Senator Styles Bridges as the neutral trustee of the health and welfare fund in an effort

[2] Examining the history of miners' health care benefits in 1990, the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) observed that the Boone Commission Report's recommendation "provided a road map for the newly created [multi-employer] [f]und to begin the process of reform." J.A. 264a; see also *Senate Coal Commission Hearing* 297 (statement of UMWA President Richard Trumka that "[t]he Boone report became a guiding force and a touchstone for the UMWA funds").

[3] See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 n.14 (1981).

to settle the parties' differences.[4] The labor unrest was eventually resolved in 1950 when a new NBCWA put into place the essence of the postwar structure for miners' health benefits. In return for significant concessions by the union in other areas, including mechanization of coal mining operations, the members of the BCOA agreed to finance health benefits to be administered by a new multi-employer trust, the United Mine Workers of America Welfare and Retirement Fund (1950 W&R Fund), and to give full cooperation to the trust in the development of its policies and in its operations. The 1950 W&R Fund was governed by three trustees (one appointed by employers, one by the union, and a neutral trustee). The trustees were given broad discretion in setting miners' health benefits, and with a few brief exceptions (which generated labor unrest), they provided retired coal miners with lifetime health benefits.[5]

An important aspect of the structure of health benefits established by the 1950 NBCWA was that financing the benefits of retired miners was the responsibility of the entire unionized coal industry. The multi-employer nature of the benefits structure was essential to its success-

[4] See *Senate Coal Commission Hearing* 297 (statement of UMWA President Trumka); *Financing Orphan Retiree Benefits* 103-104; J.A. 264a.

[5] See Woodrum & Rothman, *supra*, 93 W.Va. L. Rev. at 640-641; *In re Chateaugay Corp.*, 53 F.3d 478, 481 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1124 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); J.A. 265a-267a (Coal Commission Report, noting that union-employer "concordat" led to a period of labor-management peace, but that occasional retrenchment of benefits in 1960s by trustees led to wildcat strikes); see also J.A. 270a (noting that "first ever reduction of medical benefits resulted in a massive unauthorized work stoppage during the summer of 1977"), 271a (noting that failure to reach agreement over health benefits was major cause of 111-day strike in 1977).

ful functioning because the forms of business organizations in the coal industry change frequently. "As an extractive industry dealing with nonrenewable resource, the coal industry is inherently subject to the closing of mining establishments. At some point, the supply of coal that can be mined at a particular location, at an acceptable cost, will be exhausted, and mining operations at that site will cease. Some coal companies may go out of business entirely. As part of a physical relocation, the company name or corporate identity of the coal operator may change; so may the type of mining."[6]

The 1950 NBCWA provided the basic benefits format for wage agreements until 1974, when demographic changes and the passage of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, led to a restructuring of the health and retirement benefits fund. In response to ERISA's new funding requirements for pension plans, the 1974 NBCWA divided the 1950 W&R Fund into four multi-employer trusts, two of which—known as the 1950 UMWA Benefit Trust (1950 Trust) and

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[6] *Financing Orphan Retiree Benefits* 34; see also *Senate Coal Commission Hearing* 15, 21 (testimony of Prof. Henry Perritt) (observing that coal operations were frequently conducted by entities limited to "a particular physical mine" and by "subsidiaries that are here today and gone tomorrow," and that because of this volatility, a multi-employer plan was necessary to prevent "a situation in which there are going to be people who are deprived of their promised benefits"); *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 19 (1993) (statement of Assistant Sec'y of Labor John Donahue) (noting that the coal industry is "generally structured as holding companies that control numerous subsidiary operations," that subsidiaries are sometimes "created to protect their controlling interests from liability," and that "[t]he use of thinly capitalized subsidiaries has sometimes permitted segments of the coal industry to avoid having to pay for health benefits promised through the collective bargaining process") (hereafter *1993 House Hearing*).

the 1974 UMWA Benefit Trust (1974 Trust)—financed medical benefits.[7] See *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 566 (1982). The 1950 Trust was set up to provide health care benefits *only* to miners who had retired before January 1, 1976 (and their dependents), including those miners who had worked for corporate entities that had signed a previous NBCWA but had ceased operations. See J.A. 276a, 289a. The 1974 Trust provided benefits to active miners, to miners who retired after January 1, 1976, and to their dependents. The 1974 NBCWA promised that covered retired miners would retain health benefits for life. Pet. App. A4; see also *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.) (quoting 1974 Agreement's provision that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage"), cert. denied, 116 S. Ct. 298 (1995); *Robinson*, 455 U.S. at 566 & n.5.

Another adjustment to retired miners' medical benefits was made by the 1978 NBCWA, which altered the operation of the 1974 Trust. The 1978 NBCWA shifted responsibility for active miners and miners who retired after 1975 to single-employer plans maintained by individual operators who employed those miners. J.A. 271a. The 1974 Trust was restricted to providing health care benefits for "orphaned" retired miners, *i.e.*, retirees whose last employer had gone out of business or otherwise ceased contributing to the Trusts. See J.A. 277a. The 1978 NBCWA also expressly obligated signatories to make sufficient contributions to maintain benefits due under the 1950 and 1974 Trusts (the "guarantee" clause) and to continue to contribute as long as the operator remained in business (the "evergreen" clause), whether or not the operator

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[7] The other two trusts covered pension benefits for miners, and are not at issue in this case.

signed an agreement subsequent to the 1978 NBCWA. See J.A. 301a-303a; Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 5, 16-21 (Comm. Print 1993) (hereafter *Financing Orphan Retiree Benefits*).

2. In the 1980s, the system for financing health care for retired miners faced a crisis. Some of the causes of that crisis were rooted in broad economic forces, such as the national increases in health-care costs, increased mechanization leading to decline in numbers of miners employed, and shifts in coal production away from the bituminous coal extraction in the Eastern United States, which had been the principal subject of the series of NBCWAs, to surface mining in the West, which was largely not covered by those multi-employer collective bargaining agreements or their arrangements for retirees' benefits. See J.A. 255a-256a, 287a-288a; *Financing Orphan Retiree Benefits* 33-36, 42. The crisis was also caused in significant part, however, by the increasingly severe problem of "orphan" retirees, *i.e.*, retirees whose employers had withdrawn from the system of financing their benefits when they failed to sign successor NBCWAs or ceased coal operations.[8] Litigation had also established that the 1974 Trust was legally responsible for the benefits of those retired miners whose employers ceased operations or declined to sign a NBCWA even after the 1978 NBCWA made individual employers responsible for the health benefits of their own employees.[9] Thus, by

[8] See J.A. 289a (Coal Commission Report noting that, as of 1989, about half of the beneficiaries of the 1950 Trust worked for employers who were no longer in operation or no longer contributing); *Financing Orphan Retiree Benefits* 32 (Congressional Research Service estimate that 72% of beneficiaries of 1950 Trust were orphans).

[9] *Financing Orphan Retiree Benefits* 16, 49-50; see *District 29, United Mine Workers of America* v. *UMWA 1974 Benefit Plan and*

withdrawing from the industry-wide agreements, operators were able to shift the cost of their retired miners' benefits to the remaining coal companies that contributed to the Trusts, and the Trusts became responsible for funding increasingly expensive benefits for increasing numbers of retirees, even while the funding base—the number of coal mines still in production covered by the NBCWA—was decreasing. By 1990, the 1950 and 1974 Trusts had incurred a combined deficit of over $110 million. See J.A. 288a-289a, 291a-293a.

After a lengthy strike at the Pittston Coal Company (which refused to sign the 1988 NBCWA and ceased contributing to the Trusts), in which health benefits were a major issue, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to assess the financial prospects of the 1950 and 1974 Trusts and to make recommendations for their long-term stability. The Coal Commission reached consensus on several issues related to the future of the Trusts. Most significantly, the Commission found that "[r]etired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years." J.A. 245a-247a; see also J.A. 236a ("Health care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits."), 237a (Commission "firmly believe[d] that the retired miners [were] entitled

Trust, 826 F.2d 280 (4th Cir. 1987), cert. denied, 485 U.S. 935 (1988); *United Mine Workers of America* v. *Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), aff'd, 902 F.2d 1558 (3d Cir. 1990), cert. denied, 499 U.S. 904 (1991).

to the health care benefits that were promised and guaranteed them and that such commitments must be honored"), 340a (Commission agreed that "[t]he health care delivery system should be designed to honor the expectations of coal miners, based on commitments made under the terms of the various [NBCWAs]"). The Commission's members also agreed that collective bargaining could not resolve the Trusts' financial difficulties, and that at a minimum "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWA]." J.A. 237a.

The principal issue on which the Commission's members did not reach agreement was whether the entire coal industry—including operators who had never signed any NBCWA or employed miners who had obtained benefits under the Trusts—should contribute toward the cost of resolving the problem of orphan retirees. J.A. 237a. The Commission therefore proposed two alternative funding plans for Congress's consideration. First, the Commission proposed a two-part plan, in which the benefits of orphan retirees would be financed by an industry-wide fee, while the benefits of other retirees whose employers were still in business would be financed by the signatories to the 1978 and subsequent NBCWAs. J.A. 307a. As an alternative funding plan, the Commission proposed no industry-wide fee or tax, but recommended seeking "additional revenues from a broadened base of current and past signatories to [the NBCWAs]," including a "reachback" to former signatories. J.A. 312a, 314a.[10] Underlying both of the Commission's proposals was the likelihood that a financing plan that rested solely on contributions from signatories to the 1978 and subsequent NBCWAs would be insufficient to restore the Trusts to solvency.[11]

[10] Although, as petitioner notes (Br. 12), the members of the Commission agreed on the need to impose contributions on past signatories "possibly reaching back to the signatory class of 1978" in the first plan, J.A. 304a, the alternative funding plan specified no cut-off date.

3. The Commission's report and recommendations were the subject of extensive consideration in Congress. At a hearing held to consider the Commission's proposals, a Senate subcommittee heard testimony and received evidence from supporters of the Coal Commission's recommendations that congressional action was necessary to "honor[] commitments to retirees" who had been promised lifetime health care benefits from the 1940s onward.[12] On

[11] See *Financing Orphan Retiree Benefits* 24-27 (reviewing evidence on this point); Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, at 57-60 (1995) (same); General Accounting Office, *Employee Benefits: Financing Health Benefits of Coal Industry Retirees* 10-11 (July 1992) (similar).

[12] See *Senate Coal Commission Hearing* 10 (testimony of Prof. Perritt), 43-45 (testimony of Michael Reilly, Chairman of BCOA, that under current trends 120,000 "coal miner retirees will not receive the benefits they were promised"), 48 (Reilly testimony that some coal operators remained parties to later NBCWAs because "I think we do have a moral obligation to the funds"), 301 (written response of UMWA President Richard Trumka to question by Sen. Boren, stating that issue before Congress is "how to continue to provide benefits to 120,000 elderly Americans who were promised lifetime health benefits"), 304, 306 (statement of Coal Commission Chairman W.J. Usery) (noting argument that "coal companies have a historical obligation, based on collective agreements negotiated 45 years ago, to pay for those benefits," and suggesting that coal companies and workers need assistance of Congress "to fulfill the promises that began in the collective bargaining process nearly 50 years ago in the White House"); see also *id.* at 16 (statement of Sen. Durenberger) (noting that question for Congress was whether to honor "a whole bunch of promises made to a whole lot of people back in the 1940s and 1950s when the cost consequences of those problems were totally unknown"), 59 (statement of Sen. Hatch) (125,000 miners and their families "were led to believe by their own union leaders and the companies for which they worked that they were guaranteed lifetime benefits").

the floor of the Senate, supporters of a legislative solution stressed that miners had been promised lifetime health benefits when the miners and the coal operators had made a "deal" in the 1940s, exchanging mechanization of the mines for a promise of "good health care in [the miners'] twilight years," and that legislation was "needed to see to it that the deal is honored."[13] Supporters of the Coal Commission Report also emphasized to Congress that coal operators that had withdrawn from the system of financing benefits had, in effect, "dumped" their retirees onto the remaining operators who were parties to the later NBCWAs, creating a "Last Man's Club" in which those operators had been forced to pay for the orphan retirees' benefits.[14] They also strongly urged the point that resolution of the benefits issue was fundamental to labor peace in the coal industry.[15]

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[13] 138 Cong. Rec. S10,783 (daily ed. July 29, 1992) (statement of Sen. Rockefeller); see also *ibid*. (statement of Sen. Byrd, that purpose of legislation is "to assure tens of thousands of retired coal miners * * * that promises made to them during their working years are not now * * * going to be reneged upon"); *id*. at S10,785 (statement of Sen. Ford, expressing appreciation that "a promise made to [the retirees] can be kept"); *id*. at S10,785-S10,786 (statement of Sen. Wofford, similar); *id*. at S17,603 (daily ed. Oct. 8, 1992) (Conference Report on Coal Act, stating that "[u]nder those agreements [the NBCWAs], retirees and their dependents have been promised lifetime health care benefits," and that legislation would assure retirees and their eligible dependents "of receiving the lifetime benefits promised under the collective bargaining agreements").

[14] See *Senate Coal Commission Hearing* 18 (Prof. Perritt, discussing "dumping"), 43-45 (testimony of Michael Reilly, discussing obligation of remaining parties to NBCWA to pay for "dumped" retirees), 46-47 (testimony of Robert Dufek, discussing "dumping"), 47, 50-51 (testimony of UMWA President Richard Trumka; similar).

[15] *Senate Coal Commission Hearing* 19 (testimony of Prof. Perritt, that collapse of benefits structure "would produce economic conflict, because this particular issue has produced economic conflict in the coal

Both Houses originally passed a modified version of the Coal Commission's first funding proposal, as part of an omnibus economic stimulus package; that legislation would have required signatories to the 1978 or any subsequent NBCWA to pay for their own retired miners' health care costs, and would have financed orphan retirees' benefits through a tax on future bituminous coal production.[16] See H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. 268-296 (1992). The President vetoed that bill, however, because it contained tax increases. See H.R. Doc. No. 206, 102d Cong., 2d Sess. 1 (1992). Moreover, the industry-wide tax on coal production was widely perceived as unfair because it forced coal producers that had never signed any of the NBCWAs and thus had not contributed to the problems facing the Trusts to pay for the solution.[17] As a result,

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fields in the past"), 40 (testimony of UMWA President Richard Trumka, that "consequences of nonaction may well be a ruinous confrontation at the expiration of the current [NBCWA]"), 306 (statement of Chairman Usery, that failure to resolve benefits issue "creates a potential for serious conflict that could affect, not only the signatory operators, but the entire U.S. coal industry," and urging legislators to "[i]magine the bitterness and strife that might follow if over 100,000 retirees from every state in the country were left without benefits which they believed were theirs for life").

[16] The legislative history of the Coal Act is reviewed at *Financing Orphan Retiree Benefits* 52-56.

[17] See *Financing Orphan Retiree Benefits* 50-51; see also *1993 House Hearing* 8-9 (testimony of Ass't Treasury Sec'y for Tax Policy Samuels, noting that coal tax "generally has been viewed * * * as forcing Western coal producers * * * to subsidize Eastern coal producers that employed a majority of the retirees being provided health benefits"); *id*. at 32 (similar; written answers submitted by Ass't Labor Sec'y Donahue); *Senate Coal Commission Hearing* 22-24; 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop); *ibid*. (final Conference Report, summarizing evolution of Coal Act, and rejecting "highly controversial" coal tax under which "those companies with no relationship to the UMWA or BCOA were to be taxed to sub-

Congress enacted a modified version of the Coal Commission's alternative funding plan, which became the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), Pub. L. No. 102-486, Tit. XIX, Subtit. C, 106 Stat. 3036 (now codified at 26 U.S.C. 9701 *et seq.*). It is that funding plan that is under challenge in this case.

4. The Coal Act was intended "to remedy problems with the provision and funding of health care benefits * * * to the beneficiaries of [coal industry] multiemployer benefit plans," to ensure "sufficient operating assets" for such plans, and "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Coal Act § 19142(b)(1)-(3), 106 Stat. 3037, 26 U.S.C. 9701 note. Congress found that, to secure the stability of interstate commerce, it was necessary to modify the coal industry's existing system for funding retiree health benefits "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health benefits to * * * retirees." Coal Act § 19142(a)(2), 106 Stat. 3037, 26 U.S.C. 9701 note.

To achieve those purposes, the Coal Act comprehensively restructured the provision of health benefits to retired miners and their dependents by, among other things, merging the 1950 and 1974 Trusts into a new private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund). See 26 U.S.C. 9702(a)(1)-(2).[18] As is relevant here, the Combined Fund provides "substantially the same"

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sidize the BCOA's private promises," in favor of "an equitable solution [that] would require that such companies remain obligated to help fund the benefit program which covered retired persons who worked for those companies").

[18] The Coal Act also established another fund, the 1992 UMWA Benefit Plan, which is not at issue here. See 26 U.S.C. 9712.

health benefits as were available under the 1950 and 1974 Trusts to retirees and their dependents who were "eligible to receive, and receiving" benefits from the Trusts as of July 20, 1992. See 26 U.S.C. 9703(b)(1) and (f); see generally 26 U.S.C. 9703(a)-(f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

Benefits paid through the Combined Fund are financed through annual premiums. Those premiums must be paid by "signatory coal operators," *i.e.*, coal operators that either signed a national coal wage agreement between the UMWA and the BCOA or made contributions under related "me-too" wage agreements. See 26 U.S.C. 9701(b)(1) and (3), 9701(c)(1). The Coal Act bases the amount of premiums on the principles that each signatory operator should bear the cost of providing benefits to its own retirees, if possible, and that all signatories should share proportionally in the cost of providing benefits to orphaned retirees whose former employers had gone out of business entirely.[19] As is pertinent to this case, premium obligations are imposed on any signatory operator that "remains in business," 26 U.S.C. 9706(a), with "business" defined by the Act to include "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry," 26 U.S.C. 9701(c)(7). The premium obligations of a signatory coal operator that has ceased all business

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[19] The Act authorized the transfer to the Combined Fund of $210 million in surplus funds accumulated by the 1950 UMWA Pension Plan, as well as amounts from the Abandoned Mine Reclamation Fund, to mitigate coal companies' liability for unassigned beneficiaries. See 26 U.S.C. 9705(a) and (b); 30 U.S.C. 1232(h). Thus far, those transfers have been sufficient to cover benefits for true "orphan" beneficiaries. See *Chateaugay*, 53 F.3d at 486. Accordingly, this case presents no question concerning former signatories' obligation to contribute toward the cost of health-care benefits of true orphan retirees; it involves only petitioner's obligation to pay for its own retirees' benefits.

activity may be imposed on a "related person" to that signatory operator (such as a corporate affiliate or individual partner)[30] that "remains in business" within the meaning of the Act. 26 U.S.C. 9706(a).

The Coal Act directs the Commissioner of Social Security to match beneficiaries of the Combined Fund with the signatory operator responsible for paying their health care benefits. 26 U.S.C. 9706(a). The Act sets forth a three-tiered formula for matching miners to coal operators, which attempts to place primary responsibility for financing health care benefits on those signatory operators that signed NBCWAs in 1978 or afterwards. The Commissioner is first directed to assign a miner to the coal operator that signed a national wage agreement in 1978 or later and that most recently employed the miner for at least two years (or to any "related person"). 26 U.S.C. 9706(a)(1). If no operator meets both criteria, then the miner is assigned to the operator that signed a national wage agreement in 1978 or later and that most recently employed the miner (or to any "related person"). 26 U.S.C. 9706(a)(2). Finally, if none of the miner's employers that signed a national wage agreement in or after 1978 (or any "related person") remains in existence, then that miner is assigned to the pre-1978 signatory that employed him for the longest period before 1978. 26 U.S.C. 9706(a)(3). See generally 20 C.F.R., Pt. 422.

5. Petitioner mined coal in West Virginia, Pennsylvania, and Kentucky from 1946 to 1965, and was a signatory

[30] The term "related person" includes "a member of the controlled group of corporations * * * which includes such signatory operator"; "a trade or business which is under common control * * * with such signatory operator"; anyone with "a partnership interest or joint venture with a signatory operator" that employed eligible beneficiaries; and "a successor in interest of" any of the above. 26 U.S.C. 9701(c)(2)(A).

to the national wage agreements during that period. Pet. App. A6. At the end of 1965, petitioner created a wholly owned subsidiary, Eastern Associated Coal Company (EACC), and carried out mining operations through the subsidiary. *Id.* at A6-A7. EACC was a signatory to the 1974, 1978, and 1988 agreements that expressly guaranteed lifetime benefits to all eligible miners and dependents. *Id.* at A7; Pet. Br. 6-7. In 1987, petitioner sold EACC to Peabody Holding Company. *Ibid.*

The Commissioner of Social Security assigned to petitioner premium responsibilities for miners who worked for the company before 1966 and their dependents, based on petitioner's status under the Coal Act as the pre-1978 signatory operator for whom the assigned miners had worked for the longest period. Pet. App. A6. Petitioner filed suit in district court, alleging that the Coal Act, as applied to it, violates the Due Process Clause and Just Compensation Clause of the Fifth Amendment, and also challenging on statutory grounds the Commissioner's interpretation of the Coal Act to require it to pay for those miners' benefits. The district court upheld the Commissioner's interpretation of the Coal Act, *id.* at A28-A35, and also upheld the constitutionality of the Act's funding obligations under the Due Process Clause and the Just Compensation Clause, *id.* at A25-A27.

6. a. The court of appeals affirmed. Pet. App. A1-A23. Addressing first petitioner's due process challenge to the Coal Act, the court stressed that the Act is "entitled to the most deferential level of judicial scrutiny," and that, "[w]here, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted in an arbitrary and irrational way." *Id.* at A10 (internal quotation marks omitted). The court also observed that, even though the Coal Act imposes retroactive liability on companies like

petitioner, the Act is nonetheless subject to review only under the rational-basis standard. *Id.* at A11-A12. "As long as the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means," the court explained, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Ibid.* (internal quotation marks omitted).

Applying that rational-basis standard, the court upheld the application of the Coal Act to petitioner. The court first held that Congress's purpose in enacting the Coal Act—to resolve persistent problems of labor unrest by ensuring that multi-employer coal retiree benefit plans are adequately funded—was legitimate. Pet. App. A12. The court then rejected petitioner's argument that the Act irrationally assigns miners to companies, such as petitioner, that left the coal industry before 1974 and did not expressly obligate themselves in later NBCWAs to provide lifetime health benefits. *Id.* at A12-A13. The court stressed that petitioner, by signing the pre-1974 NBCWAs, had contributed to miners' legitimate expectations of lifetime health benefits. *Id.* at A13. The court also noted that the Act "actually takes some pains to shield companies like [petitioner]," which ceased direct involvement in coal mining operations before 1974, from disproportionate liability by directing the assignment of retired miners first to any nondefunct coal mining company that employed them after 1978. *Id.* at A15. And it observed that the Coal Act's system is in many respects more rational than an alternative scheme suggested by petitioner, which would impose all the costs of retired miners' health care on post-1974 coal operators, because such a scheme would require that the premiums necessary to fund health benefits for many retired miners be paid by companies that had never employed them. *Id.* at A16 n.5.

b. The court analyzed petitioner's taking claim by applying the three factors identified by this Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), as having "particular significance" to such a claim: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action." Pet. App. A20 (internal quotation marks omitted).

As for the economic impact of the Coal Act on petitioner, the court first noted that this case "does not involve the total deprivation of an asset." Pet. App. A20. The court then concluded that the Act's impact on petitioner "reflects a sufficient degree of proportionality" because petitioner will be assigned to pay for miners' medical benefits only when no post-1978 NBCWA signatory (or related person) can be found, and because petitioner will be liable only for those individuals "whom it employed for a relevant (and relatively long) period of time." *Id.* at A20-A21. With regard to the second *Connolly* factor, petitioner's investment-backed expectations, the court rejected petitioner's argument that it could have had no expectation that it would be made liable for its retirees' health benefits. *Id.* at A22. In light of the pattern of federal intervention in (and regulation of) the coal industry and petitioner's own role in fostering miners' expectation of lifetime benefits, the court reasoned, petitioner "had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation [of lifetime health benefits] engendered." *Ibid.*

The court further found that the nature of the government action under the Coal Act lends support for the Act's constitutionality. Pet. App. A22-A23. The Act, noted the court, does not require physical invasion or permanent appropriation of petitioner's property, but rather "adjusts

the benefits and burdens of economic life to promote the common good." See *id.* at A22 (quoting *Connolly*, 475 U.S. at 225). Further, the funds collected are disbursed to a private benefit fund (the Combined Fund), not a government entity. *Id.* at A23. Thus, the court concluded, "there is no basis whatever for [petitioner's claim] that the statute transgresses the Takings Clause." *Ibid.*

SUMMARY OF ARGUMENT

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, establishes a comprehensive, privately funded regime for providing health benefits for retired union miners and their dependents, with the costs to be borne in large part by the coal operators that signed national multi-employer wage agreements (NBCWAs) establishing a predecessor retirement benefits program, and employed the retired miners. The Act creates a three-tiered system for assigning current beneficiaries to signatory operators based on, *inter alia*, the wage agreements that the operator signed and the miner's length of service with that employer. That mechanism for financing health-care benefits comports with both the Due Process Clause and the Just Compensation Clause.

I. Economic legislation challenged as a violation of substantive due process is subject only to minimal and highly deferential scrutiny under the rational-basis standard. The deference accorded such legislation is no less applicable when that legislation is applied retroactively. Retroactive legislation, including cost-spreading legislation of the nature that is at issue here, will be upheld as long as it is rationally designed to accomplish a legitimate purpose. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

The Coal Act was intended to prevent disruption of interstate commerce by addressing a source of serious

instability in the coal industry, the inadequate funding of retired miners' health benefits; that end was plainly legitimate. The Act accomplished its objective of ensuring adequate funding for those benefits by placing primary funding responsibility on the miners' former employers. That approach was permissible. After reviewing the conclusions of an advisory commission established by the Secretary of Labor to examine the crisis in the coal industry and make recommendations for its solution, and after receiving testimony and evidence submitted both for and against the Coal Commission's recommendations, Congress determined that retired miners, their survivors and their dependents had a legitimate expectation of continued health benefits, based on implicit or explicit promises made to the miners during the experience of the multi-employer benefit plans. Congress also received evidence that mine operators that had withdrawn from that multi-employer system had effectively shifted the costs of funding their retirees' benefits to other operators, who had remained in the system. Congress therefore reasonably determined that the former employers who were responsible for the miners' legitimate expectations should be responsible for financing the fulfillment of those expectations. And after examining several options for solving the health-care crisis in the coal industry, Congress chose the funding mechanism in the Coal Act because it was concerned about the effectiveness and fairness of other approaches that had been suggested.

Although petitioner argues that Congress erred in basing the Act on those judgments and that evidence, this Court's precedents do not permit petitioner to prevail by "proving" that it did not cause the funding crisis that the Act was designed to address. Congress's judgment that all signatories to the NBCWAs did play a role in the ultimate funding crisis "is not subject to courtroom factfinding."

FCC v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Nor can petitioner establish a due process violation by attempting to show that Congress's assumptions underlying the Coal Act fail in petitioner's particular case. The question is not whether the statute precisely filters out only those fitting the fact pattern that caused congressional concern, but rather, whether Congress had a rational basis for its judgments. See *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975).

II. Petitioner's claim under the Just Compensation Clause likewise fails. The Coal Act satisfies the standard this Court has set forth in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), and *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), for assessing whether a governmental regulation effects an uncompensated taking of property. Although petitioner urges the Court to review the Coal Act as though it caused a physical invasion of petitioner's property, the Court in *Concrete Pipe* and *Connolly* rejected a similar argument. Petitioner also errs in suggesting that a taking occurs unless there is a direct causal connection between the problem addressed by the legislation and the property burdened under it. A nexus test originating in the doctrine of unconstitutional conditions has been applied by the Court in cases involving government requirements that landowners grant easements, but it is limited to government-compelled dedications taking away the right to exclude others from the use of property, and is inapplicable to economic regulation of the sort at issue here.

The Coal Act satisfies the three-part test of *Concrete Pipe* and *Connolly*. First, because the Coal Act is economic regulation adjusting private burdens and benefits in society and does not involve a physical occupation of

petitioner's property, it does not have the character of a classic taking. Second, petitioner has failed to show that the economic impact of the Act on it is out of proportion to its experience, for petitioner has been assigned responsibility only for those miners that it formerly employed, and for their dependents (and indeed only if no later employer of those miners or related entity is available to shoulder that responsibility), based on its participation in a system that created a legitimate expectation that those persons would receive health-care benefits. Third, the Act does not interfere with petitioner's reasonable investment-backed expectations, in light of the extensive history of federal involvement in and regulation of the coal industry and multi-employer benefit plans generally, as well as petitioner's particular expectation that it would benefit from the participation in the coal industry of its subsidiary (to which it shifted its coal operations), including that subsidiary's participation in the NBCWA system. Thus, Congress reasonably concluded that operators like petitioner should bear the cost of financing the health-care benefits of their own retirees, who had a legitimate expectation of receiving those benefits from the multi-employer system in which those operators participated, and that those costs did not have to be borne by the public at large.

ARGUMENT

I. THE COAL ACT IS RATIONAL ECONOMIC LEGISLATION CONSISTENT WITH THE SUBSTANTIVE REQUIREMENTS OF THE DUE PROCESS CLAUSE

A. To demonstrate that the Coal Act violates the substantive requirements of the Due Process Clause for economic legislation, petitioner must traverse "unusually inhospitable legal terrain." *In re Chateaugay Corp.*, 53 F.3d 478, 487 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995). Petitioner must show that the Act cannot survive a standard of review that is among the most deferential in constitutional jurisprudence, for "[t]he day is gone when this Court uses the Due Process Clause * * * to strike down * * * laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical*, 348 U.S. 483, 488 (1955). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Ibid.*

As a "legislative Act[] adjusting the burdens and benefits of economic life," the Coal Act enjoys a strong "presumption of constitutionality," and the "burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); see also *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 637-639 (1993). If the statute "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches[.]" *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

Congress has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985). Nor is Congress required to tailor a statute regulating economic activity narrowly and precisely to achieve its objectives. *Turner Elkhorn*, 428 U.S. at 18-19. To the contrary, a statute like the Coal Act "need not be in every respect logically consistent with its aims to be constitutional." *Williamson*, 348 U.S. at 487-488. Indeed, it may be sustained on any "conceivable" rational basis, even one not expressly adverted to by Congress or contemplated at the time of passage. See *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993).

Nor is a more stringent standard of review applicable to the Coal Act on the ground that the Act is said to have a retroactive effect. The Court has made clear that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *R.A. Gray*, 467 U.S. at 729. Even when a statute has retroactive effect, the Due Process Clause is satisfied as long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

Moreover, contrary to petitioner's contention (Br. 19, 24), this Court has not limited its approval of retroactive legislation to circumstances in which a short period of retroactivity was necessary to "cure" mistakes in prior legislation. The Due Process Clause gives legislatures broad discretion in adjusting economic rights and duties, and the "vague contours" of due process do not prescribe limits on a legislature's authority to make retroactive

adjustments any more than they dictate other line-drawing decisions that enter into the drafting of economic legislation. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963). Thus, the Court has upheld retroactive civil legislation enacted to allocate litigation costs fairly among classes of litigants, *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); to give previously injured workers the benefits of an improved workers' compensation law, *General Motors Corp.* v. *Romein*, 503 U.S. 181 (1992); and to enable disabled coal miners suffering from an occupational disease with a long latency period to recover disability benefits from their employers even though their employment terminated before the legislation's enactment, *Turner Elkhorn*, *supra*. See also H. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143, 2156 (1996) (citing cases and statutes).[21]

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[21] While this Court has noted that Congress's practice in the tax field has been to confine retroactive application to "short and limited periods," *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981) (per curiam), none of this Court's decisions suggests that due process compels that practice. And although the Court has suggested that "beyond some temporal point" retroactive laws may offend due process, *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation*, 496 U.S. 18, 40 n.23 (1990), it has never established an absolute temporal limit to the retroactive application of legislation. Moreover, Congress's self-imposed custom with regard to tax legislation, which is intended to fund current government operations and is therefore ordinarily prospective, is not necessarily applicable to civil regulatory legislation. Many problems outside the tax area, such as black lung disease and hazardous waste, may exist, though latent, for a long time and may impose massive social costs before they are recognized as a proper subject for legislation; and even once the legislation to address them is enacted, further passage of time may yield new information that exposes inadequacies in prior law. Similarly here, the long-term contractual relationship among operators and the UMWA under the NBCWAs makes it appropriate for legislation

Petitioner is likewise incorrect in suggesting (Br. 35) that due process requires a "tight causal nexus" between the conduct of a party subject to economic regulation and the harm addressed by the statute. Even when Congress legislates retroactively, it is not limited to regulating those entities that most directly caused the problem that is addressed by remedial legislation. Such a test would inappropriately restrict Congress's ability to legislate in any area where it is difficult to determine precisely who "caused" the problem, and to what degree. Due process requires only that Congress's judgment as to who should bear the costs of a program be *rational*. It is sufficient if Congress "legislate[s] retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *Sperry*, 493 U.S. at 65.[22]

Thus, Congress has wide latitude to spread the costs of a remedy across an industry, rather than select only those specific participants who "caused" the need for remedial legislation. In fact, *Turner Elkhorn*—which petitioner cites as the source of its causation requirement (Br. 23-24)—made clear that, had it chosen to do so, Congress could

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that responds to the cumulative consequences of that relationship to take account of events over a period of years. The Due Process Clause does not impose any particular time limit on legislatures' authority to respond in such circumstances, but requires only that the response be rational.

[22] Petitioner's insistence that due process requires a close causal nexus is particularly odd in light of its assertion that the Coal Act assessment is a tax (Br. 25 n.40). No decision of this Court suggests that Congress may impose taxes only on those who "caused" the need for the tax. See, *e.g.*, *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) ("Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.").

have allocated the costs of providing benefits to miners disabled by black lung disease to new industry participants or even participants who took measures to protect miners from occupational risk of incurring the disease. 428 U.S. at 18. The Court stressed that it was for Congress to determine whether to impose the burden of inactive miners' disabilities on all operators (including those just mentioned who bore no direct responsibility for the disabilities), or instead to impose the burden on "those who have profited from the fruits of their labor"—*e.g.*, early operators "whose profits may have increased at the expense of their employees' health." *Ibid.* In sustaining the approach Congress ultimately chose, the Court found it "enough to say that the Act approaches the problem of cost spreading rationally; whether a broader [or narrower] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Id.* at 19.

B. Under the applicable standard of rationality, the funding provisions of the Coal Act—including in this case the imposition of premiums on operators that signed NBCWAs before 1978 but did not do so in 1978 or afterwards—meet the requirements of due process.[23]

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[23] All courts of appeals that have addressed the funding provisions of the Coal Act have upheld them as rational and consistent with due process. See Pet. App. A1-A23 (decision below); *Holland* v. *Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co.* v. *USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996), cert. denied, 117 S. Ct. 682 (1997); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832 (6th Cir.), cert. denied, 116 S. Ct. 64 (1995); see also *Unity Real Estate Co.* v. *Hudson*, 977 F. Supp. 717 (W.D. Pa. 1997), appeal pending, No. 97-3234 (3d Cir.); *Mary Helen Coal Corp.* v. *Hudson*, 976 F. Supp. 366 (E.D. Va. 1997); *Holland* v. *High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D.W.Va. 1996).

1. Retroactive application of the Act need only be "supported by a legitimate legislative purpose furthered by rational means." *R.A. Gray*, 467 U.S. at 729. That there are legitimate legislative purposes to the Coal Act—protecting the health benefits of retired coal miners and their survivors and dependents, and resolving a crisis in the system of financing those benefits—can scarcely be open to dispute. Congress knew, based on the federal government's long experience in the coal industry from the federal takeover of the coal mines in the 1940s through the government's efforts to mediate the Pittston strike of the 1980s, that the funding shortfall in the 1950 and 1974 Trusts threatened to deprive thousands of retired miners and their dependents of their health benefits, and also threatened seriously to disrupt interstate commerce. See Coal Act § 19142(b), 106 Stat. 3037. Congress was also aware that retired miners' health care has long been a central issue in labor relations in the coal industry, and that a lasting, peaceful resolution of those labor relations required a definitive settlement of the issue of retirees' benefits, just as such a resolution was required in 1950 when the UMWA and the BCOA entered into the definitive postwar arrangements for miners' health benefits.

2. The means chosen by Congress to achieve the objectives of the Coal Act were rational. For a number of reasons, Congress was justified in concluding that part of the Coal Act's costs should be borne by operators who had signed NBCWAs before 1978.

First, Congress made the judgment, based on the conclusions of the Coal Commission and the evidence presented during the framing of the legislation, that miners who had worked for coal operators between 1950 and 1978 had legitimate expectations of lifetime health benefits for

themselves and their dependents—whether or not those expectations had been reduced to express contractual promises in the NBCWAs—and that it was therefore fair and reasonable to require those operators to make good on part of the cost of fulfilling those expectations. See pp. 9-12, *supra* (reviewing conclusion of Coal Commission and legislative evidence).[24] "Every signatory company, including [petitioner], participated in the creation and development of a multi-employer health benefit program that provided lifetime health benefits for retirees for almost fifty years." *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1124 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996).[25] Petitioner was "part of this tradition and can rationally be said to have contributed to a reasonable expectation of lifetime benefits." *Id.* at 1125; accord *In re Blue Diamond Coal*

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[24] See also *Templeton Coal Co.* v. *Shalala*, 882 F. Supp. 799, 825-826 (S.D. Ind. 1995) (discussing some of the evidence), aff'd *sub nom. Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); *United Mine Workers of America* v. *Nobel*, 720 F. Supp. 1169, 1178 (W.D. Pa. 1989) (noting "25-year history of lifetime benefits prior to 1974"), aff'd, 902 F.2d 1558 (3d Cir. 1990), cert. denied, 499 U.S. 904 (1991).

[25] As noted above (pp. 6-7, *supra*), the 1950 Trust, which was set up by the 1974 NBCWA after the enactment of ERISA, was established to provide benefits for miners who had *already* retired, and expressly guaranteed that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage." See *Chateaugay*, 53 F.3d at 482. The fact that the coal industry, in the 1974 agreement, collectively promised to provide lifetime benefits to miners who had already retired, whether or not those miners' employers were still mining coal or were even still in existence, strongly suggests that a firmly settled expectation had already arisen among coal operators by that time that the unionized sector of the bituminous coal industry was responsible for financing the health-care benefits of retired miners and their dependents.

Co., 79 F.3d 516, 522 (6th Cir. 1996), cert. denied, 117 S. Ct. 682 (1997).

Second, petitioner, like other signatories to the NBCWA, provided service credits to its employees that counted toward their eligibility for pension and retirement health benefits. See *Blue Diamond*, 79 F.3d at 522-523; cf. *Concrete Pipe*, 508 U.S. at 637-639. Congress might well have concluded that those companies that then ceased coal mining operations before 1978 had, in effect, shifted the cost of their own retirees' health benefits to other companies that remained in business, signed the wage agreements in 1978 and afterwards, and assumed the burden of financing retired miners' benefits as part of the cost of a comprehensive solution to labor relations. See pp. 8-9, 12-13, *supra*. It accordingly was proper to require the pre-1978 signatories to contribute to a solution that applied to retired miners in the entire industry.

Third, there was ample evidence for Congress to conclude that any solution that rested only on contributions from signatories in 1978 and later would be inadequate. See pp. 10-11, *supra*. By the same token, Congress could reasonably conclude that an industry-wide tax on current coal production would unfairly require contributions from coal operators that never had employed any of the retired miners (or had any relationship with any operator that did), and therefore had nothing to do with the problem to be addressed. See p. 13, *supra*.

Finally, petitioner, like other operators, profited from the miners' labor[26] and concessions given in exchange for better health benefits. See *Carbon Fuel Co.* v. *USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996). They also bene-

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[26] See 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) (Sen. Wallop) (Act assigns financial responsibility to "those companies which employed the retirees in question and thereby benefitted from their services").

fited from the labor peace and industry-wide mobility of miners that were facilitated by the mechanism of portable service credits. Those credits were consistently honored by the funds both before and after petitioner left the coal industry.

3. Petitioner argues that Congress could not have rationally required it (and others like it who left the coal industry before 1978) to contribute because it made no express contractual commitment to finance miners' health benefits for life, and because it had closed its own books on its obligation to its employees before 1978. In essence, petitioner challenges the premise that it and similarly situated operators, either themselves or through the Trusts, implicitly created a legitimate expectation that lifetime benefits would be paid to those who worked in the mines before 1978. Petitioner emphasizes (Br. 19, 27-28) that the 1950 W&R Fund, to which it contributed before 1965, was not a defined benefit plan, and that benefits during the time of its contributions were revocable rather than vested. That argument misapprehends the "quite minimal" nature of judicial scrutiny under rational-basis review. See *National R.R. Passenger Corp.*, 470 U.S. at 472. The rationality of Congress's action "is not subject to courtroom factfinding" and need not be supported "by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. Petitioner cannot prevail on its due process claim by offering to "prove," as a factual matter, that the assumptions underlying Congress's actions are incorrect, either generally or specifically as applied to petitioner. "[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981). "Since in view of the evidence before the legislature, the question clearly is at least debatable," Con-

gress's action must be sustained. See *id.* at 469 (internal quotation marks omitted).

Moreover, the Due Process Clause does not require Congress to adhere to the express terms of pre-existing private contracts, see *National R.R. Passenger Corp.*, 470 U.S. at 472 n.25; *R.A. Gray*, 467 U.S. at 726-727, and "legislation is not unlawful solely because it upsets otherwise settled expectations," *id.* at 729-730 (quoting *Turner Elkhorn*, 428 U.S. at 15-16); see also *Concrete Pipe*, 508 U.S. at 637, 646-648. It is sufficient that Congress concluded that pre-1978 signatories, by their actions and their participation in the system of financing benefits, had contributed to miners' expectation that they would receive health benefits for life, whether or not that expectation was reduced to contract.

Thus, in *National R.R. Passenger Corp.*, *supra*, the Court upheld a provision of the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327, that required private railroads that transferred their common-carriage obligations to Amtrak to reimburse Amtrak for free and reduced-fare rail-travel privileges that Amtrak provided to the railroads' former employees and their dependents. The railroads argued in that case that their practice, before the creation of Amtrak, of giving their employees rail-travel passes was "a gratuitous undertaking, like providing a Christmas turkey," and that they had never expressly agreed to provide those passes into the indefinite future. See 470 U.S. at 474. This Court nonetheless readily concluded that Congress had acted rationally in requiring Amtrak to honor "the expectations of the railroads' past and present employees and their dependents" to continued rail-travel privileges, and in requiring the private railroads to reimburse Amtrak for the cost of those privileges, *id.* at 477. The Court observed that the scheme was permissible "both because the railroads,

rather than the taxpayers, were responsible for the creation of the moral obligation to the railroad employees and retirees, and because the railroads benefited from labor peace and continued employee morale." *Ibid.*

Whether another system of financing retirees' health benefits would have been more efficacious or fair was for Congress to decide. Indeed, Congress considered the financing options at hand closely, and came to the conclusion that the funding mechanism of the Coal Act was preferable to other approaches. Congress might have financed benefits through a tax on current coal production, but that option was subject to objection in Congress on the ground that it compelled a subsidy of unionized Eastern coal operators that had signed the various NBCWAs by other coal operators that never had anything to do with the NBCWAs. See p. 13, *supra*. Congress might have restricted funding obligations to signatories of the then-current NBCWA, or NBCWAs dating only from 1978 onward; but it was doubtful that those approaches would have yielded sufficient funds, and all of them were subject to the objection that they would have forced later signatories to continue paying for retired miners they had never employed, but had been employed by operators that had withdrawn from the NBCWA before 1978 and shifted their costs to others. Congress instead adopted a tiered financing system that placed responsibility, wherever possible, on those current and former signatories that it deemed most responsible, *i.e.*, former employers of current beneficiaries. That approach was entirely rational.[27]

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[27] Petitioner relies (Br. 25-26) on *Railroad Retirement Board* v. *Alton Railroad*, 295 U.S. 330 (1935), but as the court of appeals noted (Pet. App. A16 n.6), that decision, even if it still retains vitality, is readily distinguishable from the case at bar. In pertinent aspect, *Alton* invalidated a federal statute that compelled railroads to finance retirement pensions of employees who had worked for them before the effective date of the law. There was no suggestion in that case, however, that the railroads before the Court had expressly or implicitly created a legitimate expectation that their already-retired employees would receive pensions upon leaving service, or that other railroads were being compelled to pay for pensions of the litigants' retirees.

C. Petitioner contends (Br. 21-22, 26-29) that, even if the Coal Act's funding provisions are valid on their face, they are unconstitutional as applied to petitioner. It is difficult to see, however, how petitioner's situation presents an "exceptional case" (Br. 21) that excuses it—alone among the signatory operators that withdrew from the NBCWA framework before 1978—from paying premiums under the 1992 Act. Congress determined that those companies that had signed a NBCWA between 1950 and 1978 and that were still in business should contribute to their own former employees' benefits, if and only if no operator that signed a NBCWA in 1978 or later and employed those miners (or a "related person") was still in existence. Petitioner falls into that class of companies.

Petitioner submits (Br. 29) that it should be excused from its financial obligations under the Coal Act because it transferred its coal operations to a subsidiary, EACC, "which continued to operate the same mine (and others), and which made all contributions to the plans that [petitioner] would have made had it remained in the mining business." Far from supporting its position, however, the fact that petitioner transferred its coal mining operations to a wholly owned subsidiary—which continued to operate until petitioner sold it in 1987—strongly reinforces the constitutionality of applying the Coal Act to petitioner. That arrangement demonstrates that petitioner retained a substantial, ongoing nexus to the coal industry and its health benefits problems until relatively soon before the Coal Act was passed. In fact, petitioner profited, through $100 million in distributed dividends, from EACC's partici-

pation in the coal industry well after 1965—including EACC's ratification of the NBCWAs through 1987 and EACC's enjoyment of the labor peace that came with those contracts. See Pet. Br. 6 n.13, 7. Petitioner is therefore ill situated to claim that it received no benefit from the post-1965 NBCWAs and may not be called upon to shoulder some of the costs facing the industry now.

Although petitioner argues that it contracted with EACC to assume future obligations to petitioner's retirees, Br. 34, petitioner remains free to seek indemnification from EACC under 26 U.S.C. 9706(f)(6), an option that petitioner is pursuing in this case.[28] The Due Process Clause does not bar Congress from placing liability in the first instance on petitioner and the other operators that actually employed the retired miners, and leaving it to those operators to recover from any third party that they believe has assumed that liability as a matter of private contract. Petitioner's contention that it would have structured its transactions differently, had it foreseen the terms of the Coal Act, is likewise of no moment: as noted above, legislation does not violate due process simply because it upsets settled expectations regarding past commercial transactions. *R.A. Gray*, 467 U.S. at 729-730.

More fundamentally, petitioner's effort to distinguish its situation from that of other pre-1978 signatories on the basis of its own corporate organization again reveals a misunderstanding of the rational-basis standard. If the lines drawn by a regulatory scheme are rational as a general matter, a party subject to that scheme does not establish a due process violation by showing that the

[28] But see *Carbon Fuel Co.*, 100 F.3d at 1134-1135 (concluding that Coal Act abrogates pre-existing private contracts allocating liability for health-care benefits to retired miners covered by the Act). We disagree with that reading of the Act by the Fourth Circuit in *Carbon Fuel*.

assumptions underlying the law fail in the circumstances of a particular case. "That there may be exceptions to the assumption on which the regulation is premised is irrelevant, * * * so long as the classification (the regulation) in the run of cases furthers its purpose." *Steffan* v. *Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994). "[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which * * * caused congressional concern, or whether it filters out more members of the class than nonmembers." *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975). As the Third Circuit stated in rejecting a similar argument, "[j]ust because a measure is over- or under-inclusive will not render it irrational. * * * A fifteen-year-old cannot successfully challenge a minimum age requirement of sixteen for driving on the basis that *she* would be a great driver even though most individuals of that age would not." *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688, 694-695 (3d Cir. 1996).[29]

At bottom, petitioner argues that, when Congress decided to include pre-1978 NBCWA signatories in the funding mechanism, it drew the line at the wrong place. But that kind of line-drawing exercise is a quintessentially legislative task, and "there is no need for mathematical precision in the fit between [the] justification and means" chosen by the legislature. *Concrete Pipe*, 508

[29] Although petitioner maintains that the relevant question is whether "Congress could rationally have concluded that *each* of the parties included in the class contributed to the problem addressed by the legislation" (Br. 25 (emphasis added)), it is doubtful that any statute could survive such a stringent standard. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller* v. *Doe*, 509 U.S. at 321 (internal quotation marks omitted).

U.S. at 639. Congress had a rational basis for regarding all NBCWA signatories as responsible, in some measure, for the ultimate financial instability of the industry's retiree health care system. The Coal Act is therefore consistent with due process.

II. THE COAL ACT DOES NOT EFFECT AN UNCOMPENSATED TAKING OF PETITIONER'S PROPERTY

A. Given that the Coal Act does not violate due process, it would be "surprising indeed to discover" that the Act effected an uncompensated taking of petitioner's property in violation of the Fifth Amendment. See *Concrete Pipe*, 508 U.S. at 641; *Connolly*, 475 U.S. at 223.[30] Recognizing

[30] There is a threshold question whether the district court properly entertained petitioner's request for an injunction, even if the Coal Act did effect a taking. A district court may not enjoin a taking of private property for public use by the federal government if the Court of Federal Claims has authority to award compensation. *Rose Acre Farms, Inc.* v. *Madigan*, 956 F.2d 670, 673 (7th Cir.), cert. denied, 506 U.S. 820 (1992); see *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985). Nonetheless, this Court has decided the merits of claims brought in district court for equitable relief from a taking, in contexts similar to this one, involving a statute requiring a private party to pay money or adjusting the interests of parties outside the government. See *Concrete Pipe*, 508 U.S. at 641-647; *Connolly*, 475 U.S. at 221-228; see also *Babbitt* v. *Youpee*, 117 S. Ct. 727, 732 (1997); *Hodel* v. *Irving*, 481 U.S. 704, 712-718 (1987). This Court apparently concluded in the latter two cases that such equitable relief was available, because its decisions that the statutory provisions at issue violated the Fifth Amendment necessarily rested on the premise that just compensation was not available. See *Williamson County*, 473 U.S. at 194-195; U.S. Br. (at 13-14 n.5) in *Youpee*, No. 95-1595; U.S. Br. (at 25 n.16) in *Irving*, No. 85-637.

In our view, when a court decides whether an action lies in district court for equitable relief to prevent the operation of a federal statute that allegedly amounts to a taking, the court should decide whether, in

the difficulty of making such a claim, petitioner first attempts (Br. 37-43) to recast the Coal Act as a permanent appropriation of its assets, similar to the government's physical invasion of private land or its destruction of all economically beneficial use of such property. That argument, however, cannot be sustained in light of this Court's decisions in *Concrete Pipe* and *Connolly*. In *Concrete Pipe*, the Court "reject[ed] Concrete Pipe's contention that the appropriate analytical framework is the one employed" in real-property cases. 508 U.S. at 643. In *Connolly*, the Court rejected the similar argument that statutory liability to a private party is always an uncompensated taking, even though the Court acknowledged t hat an employer subject to the liability at issue there "is permanently deprived of those assets necessary to satisfy its statutory obligation." 475 U.S. at 222. See also *Sperry*, 493 U.S. at 62 n.9 (rejecting argument that user fee was akin to a permanent physical appropriation of property). Thus, contrary to petitioner's contention, the

light of the statute's language, context, and history, Congress intended to pay compensation if the governmental action could be implemented only if accompanied by compensation, or whether Congress intended rather to have the legislation enjoined if it were found to constitute a taking. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017-1019 (1984). In this case, neither the text nor the legislative history of the Coal Act indicates whether Congress meant to allow suits by the coal companies for compensation in the Court of Federal Claims under the Tucker Act. But because the Coal Act regulates a private relationship among the miners, their union, and the coal companies, it is most unlikely that Congress intended that the United States Treasury would be liable to the coal companies if the contributions they challenge here were deemed to be a taking. It is far more likely that, were the Coal Act found to result in a taking, Congress would have wanted the Act to be enjoined as applied to the challenger, and then to reserve to itself the opportunity to determine legislatively what course of action to adopt. Thus, the district court properly entertained petitioner's suit for equitable relief on the taking claim.

proper analytical framework is not that set forth in cases like *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and its progeny, governing invasions and appropriations of physical property, but rather the well settled framework for regulatory takings applied by the Court in *Concrete Pipe* and *Connolly*.

There is also no merit to petitioner's suggestion (Br. 37-43) that an economic regulation like the one at issue here must be deemed a taking in the absence of a direct causal connection between the problem addressed and property burdened. Petitioner appears to derive that standard (Br. 38-39) from *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). Those cases, however, involved uses of real property—specifically, regulations that impaired private landowners' right to exclude the general public from their land. In *Dolan*, for example, the crucial fact was that "the conditions imposed were not simply a limitation on the use [Dolan] might make of her own parcel, but a requirement that she deed portions of the property to the city." 512 U.S. at 385; cf. *Nollan*, 483 U.S. at 831, 834. For that reason, the Court declined to adopt the framework applicable to regulations of private land *use*, and instead viewed the case as more akin to one involving appropriation of land. The Court then applied its standard of an "essential nexus" and "reasonable relationship" (or "rough proportionality"), which it derived from the doctrine of unconstitutional conditions (the condition in that case being the surrender of land to the government). See *Dolan*, 512 U.S. at 385. Neither case had occasion to apply or question the regulatory-taking test applied in *Connolly* and *Concrete Pipe*.

B. This Court has long emphasized that "[g]overnment hardly could go on" if the financial disadvantage caused by legitimate regulation of economic activity were routinely

or even frequently deemed to be a taking of private property requiring compensation. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 472 (1987); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922); *id.* at 422 (Brandeis, J., dissenting); see also *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887). "[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of justice and fairness." *Ibid.* (internal quotation marks omitted).

This Court has identified "three factors with particular significance" for assessing whether a governmental regulation effects an uncompensated taking of property. See *Concrete Pipe*, 508 U.S. at 643. The Court considers (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulatory action interferes with reasonable investment-backed expectations. *Id.* at 644-645; *Connolly*, 475 U.S. at 225. Those factors all point to the conclusion that the Coal Act does not effect an uncompensated taking of petitioner's property.

1. First, as to the character of the governmental action, it is highly significant that the Coal Act does not appropriate any assets to the government's own use, but rather distributes liability among private parties. See *Concrete Pipe*, 508 U.S. at 644-645 (similar); see also *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (noting that "[a] 'taking' may more readily be found when the interference with property can be characterized

as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good") (citation omitted). The Combined Fund was established by Congress as a private entity to provide adequate financing for the health benefits of miners (who, of course, are themselves private persons), and thereby to secure stability in interstate commerce. Although the Coal Act itself is undoubtedly government action, the liability that it establishes runs from one private party to another. Thus, the Act should be viewed as one of the innumerable situations in which, "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly*, 475 U.S. at 223.

Furthermore, the Coal Act is intended to ensure that labor disputes in a nationally important industry do not disrupt interstate commerce. The legislation's purpose of promoting stability is of considerable significance in the takings analysis, for this Court has been reluctant to find that legitimate regulation constitutes a taking unless the regulation, in practical effect, destroys all economically beneficial uses of real property—a result that is plainly not present here. Cf. *Keystone*, 480 U.S. at 488-489; *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1018-1019 (1992). The Coal Act's immediate purpose, in fact, is similar to that advanced by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, examined by the Court in *Concrete Pipe*

and *Connolly*: securing the financial stability of a complex multi-employer benefit plan.

Petitioner seeks to distinguish the Coal Act from the MPPAA by arguing that the MPPAA imposed liability only on those employers that withdrew from the pension plan and thereby caused the harm that the statute sought to correct. As noted earlier, however, this Court's withdrawal-liability cases show that there is no basis for importing a causation requirement into the taking analysis applicable to this case. See pp. 38-40, *supra*. In any event, petitioner's insistence (Br. 42) that it played no role in the development of the problems addressed by the Coal Act is simply incorrect. When petitioner departed the coal industry, it left behind employees and retired employees who had an expectation of lifetime health benefits and portable service credits countable towards eligibility for those benefits, cf. *Concrete Pipe*, 508 U.S. at 638, and it effectively shifted the burden of financing those benefits onto the remaining signatories to the NBCWAs. The fact that such benefits were not legally vested until after petitioner's withdrawal from the NBCWA system is of little practical importance in light of the miners' reasonable expectation, based on almost half a century of past experience, that that "pay-as-you-go" plan would continue to fund health benefits into the future.

2. As for the economic impact of the Coal Act on petitioner, that factor at a minimum requires petitioner to show that the burdens placed on it under the Act are wholly disproportionate to the basis for Congress's conclusion that petitioner should be liable for its retired miners' benefits. See *Connolly*, 475 U.S. at 226 (rejecting argument that withdrawal liability actually imposed "will always be out of proportion to its experience with the plan"); *Concrete Pipe*, 508 U.S. at 645 (reaching similar conclusion, even though Concrete Pipe was required to

pay out almost half of its shareholder equity to meet its obligations under the MPPAA). Petitioner argues (Br. 44) that proportionality is absent here because it neither promised lifetime health benefits for miners nor contributed to the funding problems that beset the Trusts. But as we have explained above, Congress reasonably concluded that pre-1978 employers were partly responsible for retired miners' expectation of continued benefits and for the financial crisis in the Trusts, and the basis for that judgment is entitled to deference. Cf. *Keystone*, 480 U.S. at 487 n.16 (noting that courts have no "license to judge the effectiveness of legislation" or to reject regulation because it is overinclusive). Petitioner's contentions, moreover, ignore the real, practical consequences of its participation in and exit from the benefit Trusts, which left petitioner's former employees "orphaned" with their benefits to be funded by the remaining signatory operators.

In fact, the Coal Act employs a carefully calibrated mechanism for assigning individual miners to those financially responsible for them. Under the statutory formula, petitioner's funding obligations are directly tied to its past employment of miners who are now covered by the Combined Fund. By "mooring a given company's funding obligations to a legitimate measure of its prior benefit from the UMWA health care system, the Coal Act rationally apportions future financial responsibility according to past participation." *Chateaugay*, 53 F.2d at 494. Under the Coal Act, moreover, the Commissioner of Social Security does not assign beneficiaries to a pre-1978 signatory like petitioner unless *no* signatory operator that employed such a miner and signed the 1978 or a subsequent NBCWA (or "related person") remains in business. Thus, the Coal Act places primary responsibility for funding the Combined Fund benefits on operators that remained in the

NBCWA system in 1978 and afterwards, and their related persons; it requires petitioner to pay premiums to the Combined Fund only because there is no such operator or related person in existence that would be responsible for the benefits of some of petitioners' retirees. And the Coal Act also recognizes that, notwithstanding the Commissioner's decision to assign those miners to petitioner, petitioner may seek contribution from another entity that it believes is more responsible, as a matter of private contractual arrangement, for paying those premiums, see 26 U.S.C 9706(f)(6), an option that petitioner is pursuing in this case. Petitioner therefore has not shown that its premium obligation to the Combined Fund under the Coal Act is "out of proportion to its experience with the plan," *Concrete Pipe*, 508 U.S. at 645 (quoting *Connolly*, 475 U.S. at 226), since it employed the retired miners who expected continued health-care benefits from the Trusts.

Petitioner urges (Br. 21, 44) that there is no proportionality between the modest benefits that petitioner's contributions funded in the 1950s and 1960s, and the "more expansive" benefits that beneficiaries now receive. The Just Compensation Clause, however, does not require that the benefits funded or the premiums levied mirror in every respect those at the time petitioner was a NBCWA signatory; the Constitution requires only that the present funding obligation be apportioned according to some rational measure. Cf. *Keystone*, 480 U.S. at 491 n.21 (noting that the Clause "has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received" in determining whether a "taking" has occurred). The Coal Act's linkage of funding responsibilities to past employment with the signatory readily satisfies such a standard and does not impose a financial burden on petitioner that is constitutionally disproportionate to the

basis for the imposition of its premium liability to the Combined Fund.[31]

3. Petitioner argues finally that the Coal Act unreasonably interferes with its investment-backed expectations, which, it contends, were reasonably based on the limited requirements of the NBCWAs to which petitioner was a party (Br. 47) and its contractual arrangement with EACC (Br. 46, 49). That argument also provides no basis for finding a "taking" here.

First, petitioner's reasonable expectations cannot be confined to the terms of its contracts, for, as we noted earlier, contractual terms do not delimit Congress's authority to legislate. See *Concrete Pipe*, 475 U.S. at 224. The past, extensive history of federal involvement in the coal industry provides a more reasonable and relevant guidepost. As early as 1946, when the government nationalized the coal mines, it was clear both that the stability of the coal industry demanded adequate employee health and welfare benefits, and that the federal government was prepared to intervene to ensure the availability of those benefits. The first multi-employer welfare and retirement fund for miners was created "in the White House in a contract between the federal government and the UMWA," J.A. 236a, and was managed by three trustees, one of whom was appointed by the federal government, J.A. 262a-263a. The federal government also undertook the survey of coal miners' health-care needs that guided the multi-employer trusts thereafter in their provision of benefits. J.A. 265a-

[31] Amici Unity Real Estate Company, *et al.*, argue (Br. 18-19) that the economic impact of the Act on them is "enormous" because initial premium assessments on the amici exceed their assets. There has been no argument in this case, however, that premium assessments pose a similar threat to petitioner, and so the condition of amici is irrelevant to this Court's fact-specific inquiry as to whether petitioner's property has been taken.

266a. The federal government's involvement in maintaining the health-care delivery system for retired miners has remained extensive. See J.A. 265a-274a.

In light of that extensive history of federal involvement —as well as the comprehensive regulation of multi-employer welfare and pension plans generally through the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*,—it was foreseeable that Congress might again impose additional obligations on coal operators to preserve labor peace and to protect the integrity of miners' benefits. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (internal quotation marks omitted).[32]

Second, petitioner's insistence (Br. 43, 48-49 & n.57) that it expected that any future liabilities would be borne by EACC as a result of its corporate reorganization, and that it would have restructured its transactions had it known otherwise, is wide of the mark. Although petitioner claims to have assigned all its liabilities to EACC, it of course expected to (and did) receive dividends and capital

[32] Amicus Washington Legal Foundation argues (Br. 12) that "[t]he general possibility that Congress might at some point revise the means of funding coal retirees' health benefits is a far cry from the specific expectation that Congress would impose" funding obligations on petitioner after it had left the coal industry. None of this Court's precedents under the Just Compensation Clause, however, requires such a degree of predictive foresight for legislation to be sustained. And although petitioner cites *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951), to argue that past federal intervention in the coal industry has resulted in successful takings claims (Br. 48 n.56), that case involved a five-month government takeover of coal mines to avert a nationwide strike during World War II, which cannot credibly be compared with the monetary premiums assessed under the Coal Act.

gains based on EACC's performance in the coal industry after the reorganization. Thus, one cannot exclude, from petitioner's "reasonable expectations," its anticipation that it would profit from its subsidiary's coal mining operations, which in turn depended crucially on a settlement of retired coal miners' health benefits through the multi-employer system of the NBCWA. In short, petitioner reasonably expected to benefit from the NBCWA system even after it moved its coal-mining assets to its subsidiary, and that reasonable expectation defeats petitioner's contention that its benefits from the multi-employer benefit system ended in 1965. And to the extent that petitioner contracted for EACC or Peabody to meet its future obligations to its retirees, petitioner can enforce the terms of those contracts. See 26 U.S.C. 9706(f)(6).

In the end, the question for the Court is whether Congress has reasonably concluded that health-benefit premiums under the Coal Act should be the responsibility of those who participated in the multi-employer benefit system and employed the miners who will receive health care benefits from the Combined Fund, or whether those premiums are "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227 (internal quotation marks omitted). The Coal Act places the obligation to fund retiree benefits on the coal operators who had an established employment relationship with miner beneficiaries and who benefited from the miners' expectation that such benefits would be paid. Because Congress may properly conclude that that obligation may be borne by the participants in private industry who employed the miners rather than the public at large, the Coal Act does not cause an unconstitutional taking of petitioner's property.[33]

[33] Amicus Pittston Coal Co. urges (Br. 9) that, if this Court were to invalidate part of the financing system for the Coal Act, the Court should invalidate the Act in its entirety. Even if we assume *arguendo* that this Court might find a constitutional defect in the Act, there would be no occasion in this case to decide the issue of severability. Petitioner has not suggested that it would be affected by the remaining provisions. Cf. *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997). Nor is any question of severability "fairly included" within the questions presented by the certiorari petition, which refer only to petitioner's particular experience. See Pet. i; Sup. Ct. 14.1(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SUSHMA SONI
Attorneys

JANUARY 1998

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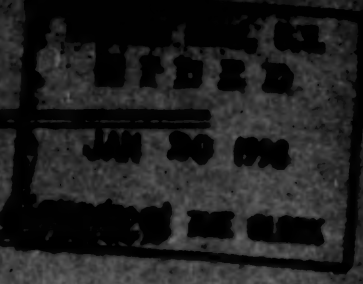

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,

Respondents,

v.

PEABODY HOLDING COMPANY, INC.,
EASTERN ASSOCIATED COAL CORP., AND
COAL PROPERTIES CORP.,

Respondents.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENTS PEABODY HOLDING COMPANY, INC. EASTERN ASSOCIATED COAL CORP. AND COAL PROPERTIES CORP.

JEFFERY L. KLINGER
701 Market Street
St. Louis, MO 63101
(314) 342-3400
Peabody Holding Company, Inc.

THOMAS R. GALLAGHER
600 Laidley Tower
Charleston, WV 25324
(304) 344-0300
Eastern Associated Coal Corp.

KENNETH A. SWEDER
Counsel of Record
LAURIE M. RUSKIN
DAVID M. BELCHER
CHRISTINE R. FITZGERALD
STROOCK & STROOCK & LAVAN LLP
100 Federal Street
Boston, Massachusetts 02110
(617) 482-6800

Counsel for Respondents

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Coal Act violates the Due Process Clause as applied to Eastern Enterprises, where the legislation requires Eastern to pay premiums for health benefits for its own retired coal miners and their beneficiaries to whom Eastern had implicitly promised lifetime health benefits and from whose labors Eastern had profited.

2. Whether the Coal Act violates the Takings Clause as applied to Eastern Enterprises, where the legislation does not deprive Eastern of all of its assets, but results merely in a shifting of liability for health care premiums for coal miners to the company that employed the miners for the longest time.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., state that an ultimate parent corporation, The Energy Group, PLC, is the only parent, subsidiary (except wholly-owned subsidiaries), and affiliate that has issued shares to the public (traded on the London and New York Stock Exchanges).

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner, Eastern Enterprises. The Defendants to the proceedings below were the Respondents, Commissioner of the Social Security Administration (now Kenneth S. Apfel), the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The Third-Party Defendants to the action below were the Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp.

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The Respondents, Peabody Holding Company, Inc ("Peabody"), Eastern Associated Coal Corp. ("EACC"), and Coal Properties Corp. ("CPC"), respectfully request that this Court affirm the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on April 7, 1997. That opinion is reported as *Eastern Enterprises* v. *Chater*, 110 F.3d 150 (1st Cir. 1997) (reprinted, along with the Judgment and Orders of the District Court, in the Appendix of Eastern Enterprises' Petition for a Writ of Certiorari).

STATEMENT OF THE CASE

Eastern Enterprises ("Eastern") has asked that the Coal Act,[1] a very carefully studied, considered and debated piece of economic legislation, which seeks to spread the health care costs of retired miners and their dependents to the very companies which profited from the miners' labors, be deemed to be so lacking in any rationality as applied to Eastern, that the Court should take a step it has not taken in 60 years and hold the statute unconstitutional.[2]

Eastern asks the Court to do this even though Eastern profited for almost forty years, from 1950 to 1987, through a series of National Bituminous Coal Wage Agreements ("NBCWAs") under which the miners in question were implicitly, if not expressly, promised lifetime health benefits for themselves and their dependents. Until 1966, Eastern

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[1] Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56, 26 U.S.C. §§ 9701-22 (the "Coal Act" or the "Act").

[2] "[T]he Supreme Court has not invalidated any piece of purely economic legislation on substantive due process grounds in more than 60 years." *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 155 (1st Cir. 1997). If this Court does not find a statute of this kind unconstitutional on due process grounds, "it would be surprising indeed to discover the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe and Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 641 (1993) (citing *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).

earned profits directly through its coal operations. Those operations made Eastern a giant in the industry — the sixth largest coal company in the United States in the 1966 time frame.[3] RA 265.[4] From 1966 to 1987, Eastern reaped profits in the form of substantial dividends received from its wholly-owned subsidiary, Eastern Associated Coal Corp. ("EACC"), which it totally dominated and controlled. The implicit promises of lifetime health benefits made before 1966 brought Eastern and other coal operators substantial relief from the chronic labor strife in the industry. The promises also gained for Eastern and the other operators the right to mechanize the mines and drastically reduce the labor force. *See Coal Commission Report: A Report to the Secretary of Labor and the American People* (Nov. 1990) ("*Coal Commission Report*"), JA 256a.[5]

But these promises of lifetime health benefits had a "latent loophole." *LTV Steel Co.* v. *Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 484 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). They were made without any prefunding requirement or withdrawal liability imposed on employers who declined to sign new NBCWAs. *Id.* The result was the creation of a system with a substantial flaw in its foundation that widened and deepened in later years, which added to the conditions

[3] While the citation here is to the 1967 Prospectus of EACC, stating that EACC was the sixth largest coal producer in the United States, one can conclude that since EACC took over most or all of Eastern's mines in 1966, that Eastern also had been an industry leader in that time frame.

[4] As used herein, "RA" refers to the Joint Appendix submitted to the United States Court of Appeals for the First Circuit under Fed. R. App. P. 30(a) and "JA" refers to the Joint Appendix filed under Sup. Ct. R. 26.

[5] The *Coal Commission Report* is the published report of the Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), which had been created by the Secretary of Labor to investigate and to propose a long-term solution to the looming crises faced by the coal industry Benefit Trusts at the time. *Eastern Enterprises*, 110 F.3d at 158; JA 245a.

necessitating the passage of the Coal Act. The Coal Act was passed to ensure that the miners receive the health care benefits that had been committed and promised to them by their employers.[6] Eastern's liability under the Coal Act to date (the amount of which is vigorously denied[7]), has been limited solely to the costs of retiree health care benefits for the miners who actually worked directly for Eastern until 1966 and who never worked for EACC. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6. Future Coal Act liability against Eastern may relate to so-called "orphan" miners but will always be directly proportional to the number of Eastern's own miners assigned under the Act. Eastern profited from the labor of all of the miners assigned to it. Eastern also gave all of these miners from whom it profited the flawed, implied promise of lifetime health benefits as retirees.

Eastern claims that the Coal Act is unfairly and unconstitutionally retroactive, arguing that the Act, as applied to Eastern, extends back almost 30 years. *See Brief of Eastern Enterprises* ("*Eastern's Brief*") at 21. Eastern's argument ignores the fact that it continued to reap substantial profits from the coal industry from 1966 through 1987 in the form of dividend payments from the profits made by its wholly-owned subsidiary, EACC. JA 145a. Eastern itself admits that those dividends totaled in excess of $100 million. *Eastern's Brief* at 6 n.13. Moreover, Eastern's domination and control of EACC through 1987 was so absolute that Eastern was a *de facto* participant in the industry until that time. *See* JA 145a-146a. Therefore, as applied to Eastern, the retroactivity of the Coal

[6] The Coal Act merged the 1950 and 1974 Benefit Trusts of the United Mine Workers of America ("UMWA") into the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702(a). The Combined Fund provides benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive and were receiving benefits from the 1950 or 1974 Trusts. 26 U.S.C. § 9703.

[7] *See Eastern Enterprises*, 110 F.3d at 160.

Act in a very real sense should be viewed as going back only to 1987, not 1965.

Set forth below in this Statement of the Case is a more detailed statement of the facts concerning the miners assigned to Eastern under the Coal Act; Eastern's participation in the coal industry and in the implementation of the retiree health benefit plans giving rise to the Coal Act; Eastern's creation, domination, and control of EACC; and the choices Congress rationally made to hold employers like Eastern liable for the commitments made to their employees.

1. Eastern Employed Samuel East And The Other Miners Assigned To It Under The Coal Act.

Eastern argued below that the Social Security Administration ("SSA") should not have assigned it any miners or their dependents. *Eastern Enterprises*, 110 F.3d at 154. Instead, it maintained, the miners should have been assigned to EACC, to which Eastern transferred most of the assets of its Coal Division in 1966. *Id.* Eastern's arguments in the District Court and the First Circuit Court of Appeals included an administrative challenge to the SSA's assignment to Eastern of the widow of a particular miner, Samuel East, as a test case under the Coal Act. *Id.* Although Eastern apparently has abandoned its attempt to have those premiums paid by EACC, which never employed Mr. East or any of the other miners assigned to Eastern, it remains instructive to view Eastern's participation in the plans in question and in the creation of the expectation of lifetime health benefits, from the point of view of Mr. East and his widow, Josephine.

Samuel East was born in Alabama. JA 212a. He was 29 years old, married, and living in West Virginia when he was hired by Eastern (then known as Eastern Gas & Fuel Associates) on January 2, 1934. JA 142a at ¶ 2; RA 2173 at ¶ 14. He was hired as a hand loader and cutting machine operator. *Id.*

Mr. East mined coal for Eastern for 26 years, from 1934 to 1960.[8] *Id.* He then worked for less than five years for Calvert Coal Co., formerly known as C.C. & L. Coal Co. JA 143a at ¶ 4; RA 2308 at ¶ 6. Mr. East never worked for EACC in any capacity. JA 143a at ¶ 5; RA 2173 at ¶ 14. Mr. East retired in early 1967. JA 143a at ¶ 6; RA 2308 at ¶ 6. He died in 1984. RA 23-25.

For 26 of the 31 years Mr. East worked as a miner, Eastern benefited from his labor. For many of those years, Eastern contributed to the UMWA trust funds and Mr. East and his widow received benefits from the funds.[9] Those benefits never ceased. JA 143a-144a at ¶¶ 7, 8; RA 2308 at ¶¶ 8, 9. Thus, for Mr. East and the other miners, they became lifetime health benefits. From the time of his retirement until his death, Mr. East received benefits from the UMWA funds, even though Eastern itself stopped contributing to the UMWA funds in the mid-1960s, and even though Calvert Coal Co. went out of business and ceased contributions in 1977. JA 143a at ¶¶ 4, 7; RA 2308 at ¶¶ 6, 8. Mrs. East continues to obtain benefits from the Combined Fund. JA 144a at ¶ 8; RA 2308 at ¶ 9.

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[8] The First Circuit incorrectly stated that Mr. East worked for Eastern for 14 years, but the difference is not critical to the issues on appeal. *See Eastern Enterprises*, 110 F.3d at 154.

[9] Specifically, Mr. East was a beneficiary of the UMWA Welfare and Retirement Funds ("W&R" Funds) of 1946 and 1947, and the 1950 W&R Fund from the inception of these plans. After his retirement in 1967, he continued to be a beneficiary of the 1950 W&R Fund's successor, the 1950 Benefit Plan. JA 143a at ¶ 7; RA 2308 at ¶ 8. Mrs. East was a beneficiary of the 1950 Benefit Plan on July 20, 1992, and thereafter became a beneficiary of the Combined Fund. JA 144a at ¶ 8; RA 2308 at ¶ 9.

2. The Evolution Of The Flawed Implicit Promise Of Lifetime Health Care Benefits Given By Eastern And The Other Operators.

a. Eastern and the other operators made an implicit commitment and promise of lifetime health care benefits.

Labor strife in the industry reached a breaking point in 1946 when the members of the UMWA went on a nationwide strike over health and retirement benefits. *Coal Commission Report*, JA 262a. The crisis led to the nationalization of the coal mines by President Truman, and eventually a collective-bargaining agreement establishing health and retirement benefits funded by an industry-wide royalty, based upon the amount of coal produced by each operator. *Coal Commission Report*, JA 262a. When the coal mines were returned to their owners in 1947, the UMWA and the Bituminous Coal Operators Association, Inc. ("BCOA"), which included Eastern, agreed upon the first in a series of NBCWAs, which included provisions for miner health and retirement benefits. *Coal Commission Report*, JA 263a-264a. Eastern was a signatory to the NBCWAs in effect between 1947 and 1965. Its wholly-owned and controlled subsidiary, EACC, signed the later agreements. RA 735-36, 763-64, 801-02, 862.

In the UMWA Welfare and Retirement Fund of 1947 (the "1947 W&R Fund"), a union welfare trust was established. It created "a welfare and retirement fund to make payments to miners and their dependents and survivors in cases of sickness, permanent disability, death or retirement, and other welfare purposes determined by the Trustees." *Coal Commission Report*, JA 263a. It also created a separate medical and hospital fund to be administered by trustees appointed by the UMWA. The purpose of the fund was to provide for medical, hospital, and related services for the miners and their dependents. *Coal Commission Report*, JA 263a. Thus, beginning in 1947, Mr. East was provided with health care

benefits which would be available to him even after he retired and would be provided to his family upon his death.

Over the next two years, labor strife continued as the UMWA and the coal operators wrangled over the details of this new and revolutionary change in the relationship between employer and employee. After another walkout, the coal operators, including Eastern, and the UMWA finally reached an agreement. In exchange for union acquiescence in the mechanization of the mines, the coal operators, again including Eastern, agreed in the 1950 NBCWA to establish the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). *Coal Commission Report*, JA 265a.

> The 1950 W&R Fund was intended to provide benefits to working and unemployed miners, their spouses and dependent children under age 18, retired miners and their spouses, widows of deceased miners, and relatives of deceased miners who cared for the miners' orphaned children. The program included the payment of unlimited hospitalization and in-hospital medical care as well as disability, death, or retirement benefits. . . . The Fund was the exclusive provider of health, pension, and other welfare benefits for UMWA active and retired miners and their dependents.

Davon, Inc. v. *Shalala*, 75 F.3d 1114, 1117 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997).

The Coal Commission found that the coal industry had at least implicitly promised its miners lifetime health care benefits which they then legitimately expected.

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they

> received during their working lives and that is how they planned their retirement years. That commitment should be honored.

Coal Commission Report, JA 245a-246a. *See also* 138 CONG. REC. S10,783 (1992) (statement of Sen. Byrd: "[T]he purpose of the amendment . . . is a simple one . . . . It is to assure tens of thousands of retired coal miners — many of whom are in poor health, and all of whom risked their lives to provide our Nation with the energy resources that made America the great economic and industrial power that it is today — promises made to them during their working years are not now, in retirement, in their 'golden years,' going to be reneged upon"); 138 CONG. REC. S10,785 (1992) (statement of Sen. Wofford: "[C]oal miners went to work each day under the assumption that their health benefits would be there when they retired"). Senator Rockefeller, the sponsor of the Coal Act, further observed:

> Coal miners have been in the vanguard of the fight for decent health care because illness and injury have been so endemic to coal mining. For decades, the fight for good health care has been central to labor relations in the coal industry. The current health program derives from the one established when President Truman seized the mines in a 1946 strike in which health care was a central issue.

138 CONG. REC. S17,632 (1992) (statement of Sen. Rockefeller).

Significantly, the expectation of lifetime benefits was expressed by those representing the operators, as well as the miners themselves. For example, Charles A. Owen, the designated trustee of the 1950 W&R Fund, representing Eastern and the other coal operators, informed the coal

operators who were signatories to the 1950 NBCWA that the Fund provided for the following:

> Welfare activities of the Fund are comprised of Death Benefits, Pensions, Medical and Hospital Service, Rehabilitation of and Cash Aid to the Disabled, and Cash Aid to Widows and Dependent Children. . . . Benefits cover Hospitalization, Surgical and Medical Care for mine worker [sic], including pensioners and dependents *during his life, without limit as to duration*, also the furnishing of expensive drugs, oxygen, etc. to the home when specified.

Charles A. Owen, *Report dated November 5, 1951*, JA 132a-33a at ¶ 39; RA 1898-99 at ¶ 5, RA 1971-72 (emphasis added).

Similarly, in a speech given on October 8, 1953, Joseph E. Moody, the president of the Southern Coal Producers Association, acknowledged that the beneficiaries of the 1950 W&R Fund had been "promised" and had "grown accustomed" to receiving the benefits provided by the 1950 W&R Fund.

> Unwise pensions and welfare plans, set up with little thought to their actuarial soundness or the ability of an industry to pay, can only cause friction and eventual hardship, and even the economic disruption of the industry or company involved. I hesitate to speculate on what might happen if the Coal Welfare Fund again goes broke. It is certain that the mine operators, already operating at a loss, cannot increase the royalty payment. Instead, it should be lowered. But depriving some 400,000 persons of benefits they have *been promised and grown accustomed to*, could be political as well as social dynamite. . . . Perhaps

> legislation by Congress is necessary to proscribe [sic] sound restrictions under which such benefit plans can operate; but if it is, we as business men and Americans must see that such legislation is passed.

Joseph E. Moody, *Speech before the Fall Industrial Relations Conference,* October 8, 1953, Cleveland, Ohio, JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000 (emphasis added).

Another factor that contributed to the creation of an expectation of lifetime benefits is the enormous price that the miners paid to extract the industry's commitment to health care. A major concession on the part of the UMWA in the negotiations over the 1950 NBCWA was its agreement to the coal industry's mechanization of the mines. *Holland* v. *Keenan Trucking Co.*, 102 F.3d 736, 741 (4th Cir. 1996). The significance of this sacrifice on the union's part is evidenced by the fact that almost immediately after its execution, the negative impact of mechanization on the workforce became apparent. "As a result of the shift in markets and the rapid mechanization of U.S. mines during the 1950s and 1960s, coal mine employment declined *75 percent* during this period from a high of 488,000 in 1950 to 130,000 by 1969." *Coal Commission Report*, JA 255a (emphasis added). Losing 75% of its workforce must have been a bitter pill for the union to swallow — and was a tremendous price to pay for the health care benefits it obtained.

> In the deal that created this health program in the 1940's, the miners agreed to mechanization of the mines, opening the way to the industry's prosperity. The miners knew that tens of thousands of jobs would be lost but that they would have good health care in their twilight years. The industry knew its labor costs would fall. This legislation is needed to see to it that the deal is honored. Mechanization is creating a very different economic future for the coal industry. But this legislation is needed to honor an historic promise from the past — to take care of the people who made industrial history.

138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller).

From the vantage point of Mr. East, his health care costs were taken care of by virtue of his employment with Eastern. Mr. East could reasonably have expected to receive, and in fact did receive, health care benefits during the course of his employment, through his retirement, and until his death. While it appears that his benefits under the 1950 W&R Fund, according to its written terms, may have been revocable, the fact remains that the basic provision of lifetime health care for coal industry retirees was *never* revoked. There is no question that Mr. East in fact received lifetime benefits. Year after year, the benefits continued. Even though Mr. East's employment with Eastern was terminated in 1960 (he worked for two other companies thereafter), and even though he retired from the coal industry in 1967, Mr. East's benefits continued. JA 142a-143a at ¶ 2; RA 2173 at ¶ 14. Over the course of *forty-two years*, Mr. East, and upon his death, Mrs. East, received health benefits under the plans signed by Eastern, and the successors to those plans.

The fact that the pre-1978 NBCWAs did not contain express promises of lifetime benefits cannot erode the expectations shared by miners and their employers that developed over more than forty years. No one ever expected those benefits to be revoked, and the acknowledged danger to the industry of "political as well as social dynamite" exploding, had there ever been a revocation, made the continuation of those lifetime benefits a virtual certainty. *See* JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000.

b. The mechanism chosen to implement the implicit commitment of Eastern and the other operators that Mr. East relied upon was flawed from the start and contributed to the financial instability of the plans.

It was not the implicit commitment of lifetime health benefits alone which Eastern and the other pre-1974 signatories made to Mr. East and the miners who worked for them which ultimately contributed to the financial instability of the plans. It was the choice Eastern and the other operators made as to the mechanism to fulfill the expectations they raised that also contributed to the instability. Eastern and the other operators chose to establish a "pay-as-you-go" system, a faulty mechanism which had repercussions for decades.[10] In the words of the First Circuit Court of Appeals:

> The crisis in retiree benefits occurred in two stages. First, the inculcation of an expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed.

Eastern Enterprises, 110 F.3d at 158.

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[10] Eastern contends that the industry-appointed trustee of the W&R 1947 Fund objected to the pay-as-you-go funding mechanism. *See Eastern's Brief* at 4-5, (citing *Van Horn* v. *Lewis*, 79 F. Supp. 541 (D.D.C. 1948)). It is not clear from *Van Horn*, however, what the industry trustee's specific objection was or even if it related to the pay-as-you-go system. Even if Eastern's reading of *Van Horn* were correct, the fact remains that in connection with ending a labor stoppage, the coal industry, including Eastern, agreed to having the 1947 W&R Fund administered by majority rule of three trustees, which naturally allowed the possibility that the industry-appointed trustee could be out-voted.

As articulated by the Second Circuit Court of Appeals, Eastern and the other operators chose a system with a "latent loophole." *Chateaugay*, 53 F.3d at 484. The pay-as-you-go system was not prefunded in any way to protect Mr. East and the other miners who worked for Eastern. Also, the system was premised upon a fundamentally false assumption that the number of coal operators would remain static.

> The Benefit Funds were established as multi-employer plans, again based on the common assumption that while some employers in the industry group might go out of business, other companies would emerge to take their place.

138 CONG. REC. S17,607 (1992).

History reflects that the assumptions made by Eastern and the other operators were faulty. Companies went out of business and others stopped signing the NBCWAs. *Coal Commission Report*, JA 272a-273a. As the burden on the remaining companies increased, so, too, did the number of companies dropping out. The reduction of the number of companies contributing to the plans was one of a number of significant reasons for the problems with the funds necessitating the Coal Act. *Coal Commission Report*, JA 246a. The pay-as-you-go system actually encouraged "dropouts" by allowing companies to leave the plans without any prefunding responsibility or withdrawal liability. "When a company ceased mining operations the Benefit Trusts' financing formula calculated a required contribution of zero." *Chateaugay*, 53 F.3d at 484.

The implicit commitment of lifetime health care benefits to the miners evolved over the course of more than forty years. As one of the members of the Coal Commission noted: "The basic cause of the Funds' problems today . . . is the cumulative result of the collective bargaining process over the years, as far

back as 1950, in which the BCOA has progressively made improved health care commitments to the UMWA, commitments that may have been entirely rational at the time but have now become economically unbearable." *Coal Commission Report*, JA 330a (statement of Commissioner Richard M. Holsten). In all, "[t]here is no such thing as mining coal and yet having no involvement in the crisis confronting health care financing and delivery in the coal industry." *Coal Commission Report*, JA 325a (statement of Vice Chairman Henry H. Perritt). Thus, until 1966, Eastern was among those who contributed directly to the instability of the plans by creating an expectation and giving an implicit promise of lifetime benefits, while at the same time choosing an inherently flawed system to deliver those benefits.

3. The Total Domination And Control Of EACC By Eastern And The Funneling Of EACC's Profits To Eastern From 1966 Through 1987.

After Eastern transferred assets of its Coal Division to EACC, Eastern continued as more than the owner of EACC, until 1987. It totally dominated and controlled EACC and took from EACC all of its profits. JA 145a.

In 1967, Eli Goldston, President of Eastern, and J.N. Philips and A.P. Boxey, Senior Vice Presidents of Eastern, simultaneously served as the Director and Chairman of the Board of Directors of EACC, Director and Vice Chairman of the Board of Directors of EACC, and President and Director of EACC, respectively. They were all also shareholders of Eastern. RA 297. Eastern's domination of the Chairmanship and Vice Chairmanship of the EACC Board of Directors continued up to 1987. Significantly, in the crucial year of 1978, when EACC signed the 1978 NBCWA, its President was C.A. Stefl, who was simultaneously a Senior Vice President of Eastern, and its directors were W.J. Pruyn, who

was simultaneously President and Chief Executive Officer of Eastern and R.H. Freeman, who was simultaneously the Executive Vice President and Chief Operating Officer of Eastern. RA 536-37. They were all also shareholders of Eastern. RA 535.

This domination and control also took the form of the dividends which EACC paid to Eastern from 1966 through 1987. A 1979 cash management manual indicates that while it was a wholly-owned subsidiary of Eastern, EACC was obligated to pay Eastern 100% of its net income, plus cash flow in excess of book depreciation and cost depletion. JA 145a at ¶ 16; RA 2172 at ¶¶ 8, 9; RA 2172-73 at ¶¶ 7-12; RA 2185. Eastern admits that EACC funneled to it more than $100 million in dividends between 1966 and 1987. *Eastern's Brief* at 6 n.14. In 1986 alone, EACC paid $24,162,854 to CPC, which then paid even more than that amount to Eastern. JA 145a at ¶ 16; RA 2172 at ¶ 9; RA 2188.

The dividends Eastern received from EACC dropped from $7,000,000 in 1976 to $1,500,000 in 1977, and to zero in 1978, largely due to strikes of the UMWA and others. RA 496, 504, 527. It is reasonable to infer that Eastern's President and Vice Presidents, who were also Eastern shareholders, were acting very much in Eastern's interest when they caused EACC to sign the 1978 NBCWA to resolve the UMWA strike. RA 536.

Eastern's control of EACC was so complete that it directed EACC's actions even on matters such as how its Board should vote regarding claims for monthly allowances and pension benefits of certain EACC employees. JA 145a at ¶ 16; RA 2172-73 at ¶¶ 10, 11; RA 2178-81, 2192-205.[11]

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[11] Discovery in the continuing third party indemnification claim on the merits has yielded even more evidence of Eastern's domination and control of EACC and Eastern's involvement and identification with the coal industry until 1987, as set forth in documents as public as Eastern's own Annual Reports.

Eastern itself, even aside from its total domination and control of EACC, did not cease all responsibilities and sever all ties in the coal industry in 1966. Eastern owned the Philadelphia Coke Division, which was a purchaser of coal from EACC, until October 1, 1976, when Eastern transferred the operations and net assets of that division to EACC for a demand note in the amount of $13,903,000. RA 525. In addition, Section 4(d) of the Stock Exchange Agreement between Peabody and Eastern shows that as of 1987, Eastern still maintained certain liabilities in the coal business as its "primary obligation" and agreed to indemnify Peabody with respect to the same. RA 2250-52.

Thus, contrary to its assertions, Eastern did not leave the coal industry in 1966. It remained a major force in the industry through its domination and control of EACC, it continued to profit greatly from coal mining until it sold the stock of EACC to Peabody in 1987, and it remained the primary obligor for certain coal-related liabilities even after 1987.

Furthermore, when the transfer of assets of the Coal Division took place in 1966, EACC did not assume all of the liabilities of Eastern, such as those which ultimately arose under the Coal Act. RA 2171-72 at ¶ 6. EACC certainly did not "stand in Eastern's shoes" for all purposes. Eastern itself acknowledges that EACC would not be liable for Eastern's "own prior [to 1966] conduct." *Eastern's Brief* at 48.[12] Peabody did not assume any pre-1966 liabilities of Eastern

[12] It is notable that while it transferred certain assets to EACC, Eastern apparently kept for itself all tax benefits which accrued prior to 1966, including those that related to the Coal Division. RA 289. Thus, liabilities in the nature of taxes for the pre-1966 period would obviously remain Eastern's responsibility as well, in addition to other liabilities for pre-1966 conduct. Three Circuits, the Second, Third and Fourth, have determined that the premiums under the Coal Act are in the nature of taxes. *See UMWA 1992 Benefit Plan* v. *Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688, 695 (3rd Cir. 1996); *Chateaugay*, 53 F.3d at 498.

when it purchased the shares of EACC from Eastern in 1987. RA 2303-05.

4. The Coal Act And The Choices Available To Congress.

By 1990, the 1950 and 1974 UMWA Benefit Plans were facing financial disaster. *See Coal Commission Report*, JA 289a. Health care costs had skyrocketed in the 1980's, and the beneficiary population under the plans was aging. Companies were leaving the industry or ceasing their contributions to the funds, leaving fewer companies to bear the burden of the plans. They were able to do so, as noted above, in part because of the faulty choices made by Eastern and other operators in establishing the 1950 W&R Fund without prefunding or withdrawal liability. *Coal Commission Report,* JA 246a-247a. *See also Eastern Enterprises*, 110 F.3d at 158. At the same time, the lifetime retiree health care promises made to Mr. East, his widow, and the other miners who worked for Eastern and the other operators, were being kept. Since his retirement in 1967, both Mr. East, until his death in 1984, and his widow, received health care benefits under the 1950 Plan and its successors. After having worked for Eastern for 26 years and in the coal industry for a total of 31 years, of course, the Easts expected and deserved such coverage as they had been led to believe they would receive.

Both the Coal Commission in making its recommendations, and Congress, in transforming those recommendations into workable legislation, faced a number of options. First, Congress had to determine who it would target to pay into the plan: the taxpayers, the retirees (who were never considered a plausible solution in that they lacked the resources to pay), or the coal industry. *See Coal Commission Report,* JA 323a. Congress settled on the coal industry as the logical funding source.

After determining that the coal industry was the most rational choice, Congress then had to determine who within the industry it would require to fund the plan, i.e., only current coal operators, those operators who had signed the 1978 NBCWA or later agreements, or the companies that had actually employed the retired miners.[13] Initially, the Senate considered a bill which provided for an industry-wide tax on all ongoing coal operations, plus an additional "per beneficiary" premium payment obligation on each company that had signed the 1978 or any subsequent NBCWA. This bill was vetoed by the President. *See* 138 CONG. REC. S17,633 (1992). Ultimately, Congress passed the Coal Act under which coal operators and related companies are required to fund the premiums for health benefits of miners who worked for them, and to assume a proportional percentage burden for payment of premiums of orphan miners. *See Coal Commission Report,* JA 312a.[14] The product of vigorous and often contentious debate in both houses of Congress, this plan, approved by the executive branch, is the culmination of what Congress viewed as the fairest, most workable solution to the crises facing the coal industry. *See* 138 CONG. REC. S17,633 (1992). *See also* 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller) (the Coal Act is "rational" and "fair").

It is not clear from its brief just who Eastern believes should bear the costs of the miners' health care benefits or what choice it thinks Congress could or should have made. Eastern does not want Mrs. East to go without health care benefits or be forced, after all these years of receiving benefits,

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[13] Other options, including taxing all coal production and taxing only bituminous coal production (regardless of whether the companies had ever been signatory to the NBCWA), met opposition in the Senate and were threatened with a presidential veto. 138 CONG. REC. S17,607 (1992).

[14] "Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies." 138 CONG. REC. S17,633 (1992).

to pay for them herself. Likewise, Eastern apparently does not believe (and cannot seriously argue) that the general public should pay for the miners' benefits in view of the forty years of promises made to them by an industry which employed them and reaped so much in profits from their labors. Presumably, Eastern would like to have the burden placed on other, current operators in the industry, who never employed Mr. East, or the other miners assigned to Eastern and never profited from their labors (as Eastern did). That option was presented and explored. However, there were many who questioned the wisdom and justice of that arrangement, including the United States Congress which ultimately chose the more rational, logical, and equitable system, which became the Coal Act.

SUMMARY OF THE ARGUMENT

I. The Coal Act as applied to Eastern does not violate the Due Process Clause. Economic legislation applied retroactively need only be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Eastern does not appear to dispute the legitimate governmental purposes underlying the Coal Act, making the relevant inquiry whether the legislative purpose of the Act is rationally furthered by the provisions requiring Eastern to bear some of the costs to remedy problems with the multiemployer benefit plans.

Requiring Eastern and other operators to contribute to remedy the plans is "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . ." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). Retroactive legislation need not be based on "blameworthiness" or asking only those who can be found to have caused the harm addressed to contribute to its solution. The employees for whom Eastern is being asked to

contribute have a "specific need" for health care benefits related to their employment by virtue of the concessions given up by the miners to get them, the implicit promises and commitments made to the miners, and the particular health sacrifices in the national interest, made by the miners while working for Eastern and the other operators.

Congress made an industry-specific, fact-specific finding that there was an implicit promise and commitment made by the coal operators which led them to the legitimate expectation of retiree health benefits. This caused a "detriment" to the miners because of the faulty choice made by the coal operators to effectuate the commitment. *See Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring). This finding by Congress cannot be rejected unless the Court finds that it could not have reasonably been conceived to be true by Congress. *See e.g., FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Eastern's claim that it bears no liability for its miners because it created and capitalized EACC which made contributions to the plans in 1966 and thereafter, is too "crabbed" a view, not taking into account that Eastern itself and other operators made the faulty implicit promise and commitment originally, and that there were a number of causes for the problems with the plans which contributed to the crises in the 1990s.

The "unique circumstances" of the total domination and control of EACC by Eastern until the sale in 1987, and the funneling of EACC's profits to Eastern, totaling over $100 million during that time, makes it fair to view the retroactivity as dating back to 1987, rather than 1965. In any event, Eastern reaped enormous profits from the labor of the miners who worked on behalf of Eastern through EACC since 1965. Yet, in spite of this benefit, Eastern has not had to pay for the retiree health care benefits it implicitly promised,

making it rational and reasonable for Congress to ask that Eastern contribute to the payment of these benefits now.

II. The Coal Act does not constitute a Fifth Amendment taking of Eastern's property. Application of the three factors outlined by this Court in *Connolly*, namely: the economic impact; the interference, if any, with distinct investment-backed expectations; and the character of the governmental action, compels the conclusion that the Coal Act is constitutional. *See Connolly*, 475 U.S. at 224.

The assignment of miners to Eastern under the Coal Act does not constitute an invasion or appropriation of assets for government use, but mandates payments to a private fund. *See Eastern Enterprises*, 110 F.3d at 161. The analysis undertaken by the Court in upholding the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA") is equally applicable to the Coal Act. *See Eastern Enterprises*, 110 F.3d at 160 (citing *Connolly*, 475 U.S. at 225; *Concrete Pipe and Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993)).

Eastern claims it did not expect to have to contribute to the lifetime health care benefits of miners such as Mr. East, but the issue is whether its lack of foresight was reasonable given its contribution to the reasonable expectation of lifetime health benefits of the miners and the faulty system to deliver those benefits it helped to put into place. Eastern's corporate reorganization in 1966 and the sale of the stock of EACC to Peabody in 1987 do not show that Eastern's "distinct," investment-backed expectations were upset by the Coal Act since both of those transactions were premised on Eastern remaining liable for its own pre-1966 conduct. The Coal Act did not upset those expectations because Eastern's liability under it is based solely on its pre-1966 conduct.

The amount of Eastern's Coal Act liability is very much in dispute. In any event, the amount of the liability is not

determinative of the economic impact prong. *See Concrete Pipe*, 508 U.S. at 645. There is no violation of the Takings Clause where all of the miners assigned to Eastern worked for Eastern and to the extent that Eastern may be liable for "orphan" miners, those assignments will be proportionally based upon the number of its own retirees who have been assigned to Eastern. The economic impact on Eastern is mitigated by Coal Act provisions including those which provide for the assignment of miners to certain coal operators other than Eastern, where possible, and compelled the transfer of funds from other plans to defray the cost of "orphan" miners.

Eastern argues that the Coal Act cannot be upheld unless a causal nexus is established between the harm the Act seeks to remedy and some conduct on the part of Eastern. No such standard has been articulated in cases such as this where the statute does not involve payments to the government for its own use. Even if a causal nexus standard were applicable in this case, that standard would be met by the Congressional findings that coal operators like Eastern played a role in the events that ultimately necessitated the passage of the Coal Act.

ARGUMENT

I. THE COAL ACT DOES NOT DENY EASTERN DUE PROCESS.

A. *The Constitutionality Of The Coal Act Must Be Upheld If It Has A Legitimate Legislative Purpose Furthered By Rational Means.*

Although Eastern's argument in the First Circuit edged toward seeking a heightened judicial scrutiny standard for determining the constitutionality of an act with retroactive application, *see Eastern Enterprises*, 110 F.3d at 156, Eastern now appears to concede that such a statute need only be

"supported by a legitimate legislative purpose furthered by rational means." *Gray*, 467 U.S. at 729.[15]

The *Gray* Court left little doubt that, with respect to legislation applied retroactively, there is the same presumption of constitutionality as applied prospectively which can only be overcome by establishing that Congress has acted "in an arbitrary and irrational way." *Id.* (quoting *Turner Elkhorn*, 428 U.S. at 15). The *Gray* Court held:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Id.

Eastern does not appear to dispute the legitimate governmental purposes underlying the Coal Act: (1) to remedy problems with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to coal industry retirees; (2) to allow for sufficient operating assets for such plans; and (3) to provide for the continuation of a privately financed program for the delivery of health care benefits to the beneficiaries of such programs. Pub. L. No. 102-486, 106 Stat. 2776, 3037.

Therefore, the relevant inquiry is limited to whether these legislative purposes are rationally furthered by the provisions which require Eastern to bear some of the costs to remedy problems with the multiemployer benefit plans.

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[15] *Eastern's Brief* at 22.

B. *The Due Process Clause Does Not Require That Congress Find That Eastern Caused The Harm Addressed By The Statute.*

Eastern is faced with an almost insuperable burden of showing that the means selected by Congress to further the purposes of the Coal Act cannot be deemed to be rational on any "conceivable" basis. *Heller* v. *Doe*, 509 U.S. 312, 319-21 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-16 (1993). Eastern cannot raise a constitutional issue by questioning whether Congress has tailored the legislation with a "mathematical precision in the fit between justification and means." *Concrete Pipe*, 508 U.S. at 638-40. This Court has found that, "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

Eastern has sought to sidestep its burdens by superimposing on the rational means test an additional "causation" requirement, that Congress must meet in order for its statutes to pass constitutional muster — a requirement found nowhere in the language or the reasoning of any prior decisions of this Court. As the Fourth Circuit observed: "The Supreme Court has never held that only responsible parties may bear the burden of remedial legislation." *Holland*, 102 F.3d at 741-42 (citing *Davon*, 75 F.3d at 1125 n.9). Eastern proposes that this Court adopt the requirement that, "the only rational basis for retroactively singling out a group or individual to bear the costs of solving a problem is that the group or individual contributed to the creation of the problem." *Eastern's Brief* at 24. Contrary to Eastern's claims, the causation of harm is not, nor should it be, the standard for testing whether Congress has adopted a rational means of accomplishing a legitimate legislative purpose.

> Such a rule would hamper Congress' ability to address problems in areas where it is difficult to find a precise "cause," and would threaten Congress' ability to impose remedial burdens on the public at large, which rarely can be identified as the direct cause of the specific ills addressed by a given piece of economic legislation. Thus, legislation need not place remedial burdens on the "most responsible" party to survive rational basis scrutiny. The legislative means need only be reasonably related to some legitimate governmental end.

Holland, 102 F.3d at 741-42.

Eastern relies upon the Court's decision in *Turner Elkhorn*, 428 U.S. 1 (1976), as support for its proposition that the Court adopt this new standard (which Congress met in any event when it rationally found that Eastern contributed to the problems of the funds which the Coal Act seeks to remediate). That reliance is misplaced. In *Turner Elkhorn*, the Court explicitly stated that its approval of the retrospective imposition of liability was not based "on any theory of deterrence . . . or *blameworthiness* . . ." *Id.* at 17-18 (emphasis added).

The constitutionality of certain provisions of the Black Lung Act[16] in *Turner Elkhorn* was not based on a finding that the operators were at fault and could be held liable for causing the miners to suffer from the disease. *Id.* Rather, the Court determined that the employment relationship and profit earned from the miners' labors, while the disease festered, provided a sufficiently rational relationship. *Id.* The Court described the legislation as a "rational measure to spread the costs of the employees' disabilities to those who have profited from the

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[16] Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. §§ 901 *et seq.* ("Black Lung Act").

fruits of their labor, the operators and the coal consumers." *Id.* at 18. In the present case, the retirees (like Mr. East) worked in those same unhealthy coal mines, earning profits for coal companies (like Eastern), while the coal industry, including Eastern, implemented a benefit plan that was not sufficiently funded to provide lifetime health benefits for the miners and their dependents. It was well within Congress' power to decide that the Coal Act, like the Black Lung Act addressed in *Turner Elkhorn*, was a rational measure to spread the costs of contributing to the health care plans to those "who have profited from the fruits of their labor," without regard to "blameworthiness." *See id.*

In upholding the retrospective application of the Black Lung Act in *Turner Elkhorn*, the Court also noted that the law "serve[d] to spread costs in a rational manner by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operators' profits." *Turner Elkhorn*, 428 U.S. at 24-25. The Court's reference to an actual cost of the business was not to the money that might have been used to prevent exposure to the coal dust which caused the black lung disease. Rather, the Court apparently was referring to "excess profits" that resulted from not having to set aside earnings "from current operations sufficient to provide compensation." *Turner Elkhorn*, 428 U.S. at 42 (Powell, J. concurring). This case provides a striking parallel in that Eastern and the other pre-1974 signatories reaped "excess profits" through their failure to set aside sufficient funds from operating profits to prefund the 1950 Plan.

Eastern has further sought to distinguish *Turner Elkhorn* on the grounds that the needs addressed under the Coal Act were not "specific," like those covered by the Black Lung Act, but more "generalized" and unrelated to the work performed by

the miners for Eastern.[17] However, the purpose of the Coal Act, to remedy problems with respect to the beneficiaries of the benefit plans in the coal industry, did relate to a "specific need" of the miners, by virtue of the very specific and central focus on health care benefits which existed in the industry negotiations leading to significant concessions by the miners; the forty-year evolution of the health care benefits involving the government, union and operators; the implicit commitment made to the miners by the operators and the plans; and the particular health sacrifices made by the miners in the national interest. "The Funds today represent the end result of over 40 years of historic evolution and efforts by the parties to fit a medical care system into a changing economic and labor relations environment." *Coal Commission Report*, JA 259a. Such a history relates to a "specific" need, not a "generalized" one.

C. *Congress Found That The Pre-1974 Employers Had Implicitly Promised Lifetime Health Benefits To The Miners.*

In addition to the profits garnered from the labor of these miners, Congress found that the pre-1974 signatory operators implicitly committed to, and created the expectation of, lifetime health care benefits for the miners who worked for them.

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[17] The "specific need" addressed by the Black Lung Act was the precise means through which the Court in *Turner Elkhorn* distinguished *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935). The *Turner Elkhorn* Court found that, in *Alton*, the purpose of the Railroad Retirement Act of 1934 was, in contrast to the Black Lung Act, too generalized to be held constitutional on due process grounds. Parenthetically, the Court in *Turner Elkhorn* also questioned the continuing "vitality" of *Alton*. *Turner Elkhorn*, 428 U.S. at 19; *see also Eastern Enterprises*, 110 F.3d at 158-59 ("*Alton* belongs to an earlier, now discredited doctrinal era, and it is no longer good law").

> Congress found that all employers who were signatories to wage coal agreements . . . created an expectation of lifetime benefits, and it determined that the fairest means to fund these liabilities was through premiums allocated among these operators.

Lindsey Coal Mining Co. v. *Chater*, 90 F.3d 688, 694 (3d Cir. 1996) (citing 138 CONG. REC. S17,603 (1992) (conference committee report)). *See also Holland*, 102 F.3d at 741; *Blue Diamond Coal Co.* v. *Secretary of Health and Human Services* (*In re Blue Diamond Coal Co.*), 79 F.3d 516, 522 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997). "Congress found that the promise was implicit and, of course, Congress does not have to be correct in its beliefs — just reasonable." *Lindsey*, 90 F.3d at 694.

In enacting the Coal Act, Congress relied on the well researched findings of the Coal Commission. Congress also relied on its own investigations which amounted to two years of further study and deliberation.[18] *Chateaugay*, 53 F.3d at 484.

After reviewing the historical evidence, both Congress and the Coal Commission concluded that pre-1974 signatories like Eastern had, in fact, made an implicit commitment to provide miners with health benefits thereby creating a legitimate expectation of lifetime benefits. *Eastern Enterprises*, 110 F.3d

[18] After the Coal Commission issued its report, Congress commenced hearings to consider its findings and recommendations. *See Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. On Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 1st Sess. (1991) ("Senate Hearings"). In October 1992, Congress passed the Coal Act as part of the Energy Policy Act of 1992 with the following stated purposes: "[T]o remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefits plans that provide health care benefits to retirees of the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, § 19142(b).

at 157; *Lindsey*, 90 F.3d at 694; *Blue Diamond*, 79 F.3d at 522; *Davon*, 75 F.3d at 1124-25.

The expectation of lifetime benefits was expressed not only by the miners, but by those representing the operators as well. For example, Charles A. Owen, the designated trustee of the 1950 W&R Fund, representing Eastern and the other coal operators, informed the signatories to the 1950 NBCWA that the Fund provided health benefits "for mine worker [sic], including pensioners and dependents *during his life, without limit as to duration* . . . ." Charles A. Owen, *Report dated November 5, 1951*, JA 132a-133a at ¶ 39, RA 1898-99 at ¶ 5, 1972 (emphasis added). Joseph E. Moody, the president of the Southern Coal Producers Association, acknowledged that the beneficiaries of the 1950 W&R Fund had been "promised" and had "grown accustomed" to receiving the benefits provided by the 1950 W&R Fund. Joseph E. Moody, *Speech before the Fall Industrial Relations Conference,* October 8, 1953, Cleveland, Ohio, JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000.

The expectation of lifetime benefits was also bolstered during the negotiations of the 1950 NBCWA. The industry made a commitment to health care premised in part on the UMWA's acquiescence to the mechanization of the mines.[19]

[19] Eastern challenges this historical fact by citing to facts presented in two other cases involving the UMWA and a biography of John L. Lewis. However, Eastern is engaging in revisionist history. In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), Eastern claims that Justice Goldberg, in his concurrence, stated that UMWA acquiescence in the mechanization of the mines was an "articulated policy of the Union since 1933." *Id.* at 698. Justice Goldberg, however, did not make this statement. The "articulated policy" the Justice was referring to involved the UMWA's "philosophy" of seeking "uniform high wages, fringe benefits, and good working conditions" for its miners. *Id.* In fact, Justice Goldberg acknowledged that "[a]s the quid pro quo for [these long articulated goals], the Union is willing to accept the burdens and consequences of automation." *Id.* This reading of the facts is consistent with this Court's presentation of the facts in the same case wherein the Court stated that as a result of the 1950 wage agreement and its amendments, and the "additional understandings" entered into between the Union and the large operators, "the union . . . agreed not to oppose the rapid mechanization of the mines which would substantially reduce

Holland, 102 F.3d at 741. The enormity of the UMWA's concession is evidenced by the fact that almost immediately after the execution of the NBCWA, the negative impact of the mechanization on the workforce became apparent. "As a result of the shift in markets and the rapid mechanization of U.S. mines during the 1950s and 1960s, coal mine employment declined *75 percent* during this period from a high of 488,000 in 1950 to 130,000 by 1969." *Coal Commission Report*, JA 255a (emphasis added). Senator Rockefeller acknowledged the union's sacrifice:

> In the deal that created this health program in the 1940's, the miners agreed to mechanization of the mines, opening the way to the industry's prosperity. The miners knew that tens of thousands of jobs would be lost but that they would have good health care in their twilight years. . . . [T]his legislation is needed to honor an historic promise from the past — to take care of the people who made industrial history.

138 CONG. REC. S10,783 (1992).

Clearly, in this context, it is not unreasonable to conclude that miners, like Mr. East, fully expected that the coal operators' commitment to health care would be honored. In fact, time proved that it was, as miners like Mr. East and their beneficiaries received health care benefits throughout their lives. In this light, it is most reasonable to conclude, as did the Coal Commission and Congress, that an expectation of lifetime benefits, dating back to the 1940's, was created through the acts of the coal industry, including Eastern.[20]

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mine employment, [and] agreed to help finance such mechanization . . . ." *Id.* at 660.

[20] Eastern denies that it made any promise of lifetime health care benefits and points out the absence of any express promise in the NBCWAs that it signed. Eastern's argument that it never explicitly and contractually promised its employees lifetime benefits is not dispositive. Congress' power to regulate is not limited by the terms of private contracts. *Connolly*, 475 U.S. at 223-24. "'Contracts, however express, cannot fetter the constitutional authority of Congress. . . .' If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." *Id.* at 224 (quoting *Norman* v. *Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935)). Moreover, "a contractual promise of lifetime benefits is not a 'prerequisite' of a congressional finding that a party bears some responsibility for the expectations created by its past conduct." *Blue Diamond*, 79 F.3d at 523 (citing *Davon*, 75 F.3d at 1125-26).

The First Circuit concluded that since Eastern contributed to the creation of this expectation, "requiring it to pay for the realization of those expectations is hardly irrational." *Eastern Enterprises*, 110 F.3d at 157. As the First Circuit observed, Mr. East was in Eastern's employ long enough to develop a reasonable expectation of lifetime health benefits. "In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step." *Id.* at 158 n.5.

There was a direct connection between the promise of lifetime health benefits and a significant detriment to the miners. As a result, this case is not the type that Justice O'Connor expressed concern about in her concurring opinion in *Connolly*, 475 U.S. 211. Justice O'Connor noted: "Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Id.* at 229. Congress found that very connection. It determined that the coal operators had implicitly promised and committed to the miners that they would have lifetime health benefits in retirement. *Coal Commission Report*, JA 245a-246a. The detriment to the miners was that they continued to labor in the mines based on that commitment, but the program put in place to see it through was a faulty one which ultimately needed to be remedied by the Coal

Act. Another detriment to the miners was the allowance of the mechanization of the mines. *Coal Commission Report*, JA 265a. Congress found an industry-specific, fact-specific connection. It would be revolutionary indeed, for the Court to find that this very specific finding and connection made by Congress between the conduct of the employers and the detriment to the employees which the statute seeks to address, was irrational. *See* n.2, *supra*.

D. *Congress' Finding Of An Implicit Promise Of Lifetime Benefits Cannot Be Rejected By The Court Unless It Could Not Have Been Reasonably Conceived To Be True By Congress.*

Eastern argues that "nothing in Eastern's conduct could have led miners to develop a reasonable expectation of lifetime retiree health benefits that would be paid by Eastern." *Eastern's Brief* at 28. As support, Eastern looks to Justice O'Connor's concurrence in *Connolly* which states that employee expectations "in the face of plain language to the contrary, are not easily traceable to the employer's conduct." *Id.* (quoting *Connolly*, 475 U.S. at 235). Eastern's reliance on Justice O'Connor's statements, however, is misplaced. While *Connolly* dealt with a legislative scheme which relates to the economy generally, the coal industry has a very particular history that was examined closely by Congress. As a result of this examination, Congress determined that there was an implicit commitment to lifetime benefits made by pre-1974 signatories, as discussed *supra* in Section I-C.

Eastern also claims that a finding that there was such an implicit promise was a "rewrite" of history and a "fiction" which the Court need not accept. *Eastern's Brief* at 30-31. Eastern is impermissibly asking the Court to re-examine the record and make its own decision as to whether the implicit commitment was or was not made. Eastern, at bottom, is

asking this Court to reject the Congressional findings and adopt what Eastern believes is a far better or wiser view of history. But Eastern, as the party "challenging the legislative judgment must convince the [C]ourt that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). This is a hurdle that is too high for Eastern to overcome no matter how much it differs with Congress' view of the historical record.

The applicable standard here is the one articulated in *Beach Communications*, 508 U.S. 307 (1993): Economic legislative choices, like those involved in the enactment of the Coal Act, are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data," *id.* at 315, although Congress did have such evidence and data, in any event, to support the passage of the Coal Act.[21]

Neither *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), nor *United States* v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) supports Eastern's position. Eastern relies on *Carolene* for the proposition that "the constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts

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[21] In *Beach Communications* this Court was asked to determine whether the statutory distinction, under the Cable Communications Policy Act of 1984 (the "Cable Act"), between cable facilities that serve separately owned and managed buildings and those that serve one or more buildings under common control or management, was in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 309. The Cable Act prohibits any person from operating a cable system without a franchise except those that serve commonly controlled or managed buildings. 47 U.S.C. § 522(7). Thus, similar to the Coal Act, it imposes "costs of franchising and economic regulation" on one group over another. *Beach Communications*, 508 U.S. at 321 (Stevens, J., concurring). In upholding the constitutionality of the act, this Court emphasized that even the absence of "legislative facts" supporting the rational basis would not make the statute unconstitutional if "rational speculation" existed. *Beach Communications*, 508 U.S. at 315.

have ceased to exist." *Eastern's Brief* at 31 (quoting *Carolene*, 304 U.S. at 153). However, this proposition is not relevant here as the factual issues are those of the past, not current ones which have changed. *Sable Communications* is similarly unhelpful to Eastern. *Sable* is a strict scrutiny case in which the Court reviewed the record in order to determine whether Congress, in drafting the legislation at issue, properly imposed the least burdensome restrictions on the petitioner's free speech.[22] *Sable* was not a case in which the Court determined whether the finding of Congress could not reasonably be conceived to be true.

E. *Eastern's Creation Of EACC Cannot Shield It From Its Own Conduct Which Contributed To The Financial Instability Of The Plans.*

Eastern insists that it did not engage in any conduct which contributed to the instability of the funds because EACC, its fully capitalized subsidiary, made all the contributions to the plans Eastern would have made had it remained in the business. *Eastern's Brief* at 28-29. Hence, Eastern maintains it was not responsible for the crisis which resulted from companies withdrawing from the plans and "dumping" their responsibilities onto other companies that have kept their commitment. *Id.*

This view of the crisis and its causes is a snapshot in time from a particular vantage point. Congress was not bound to such a narrow and restricted viewpoint, so long as its findings were rational. *Heller*, 509 U.S. at 319-21. As noted above in Section 2-b of the Statement of the Case, the conduct of coal operators, including Eastern, prior to 1966 laid the foundation

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[22] *Sable Communications* involved a challenge to the constitutionality of the Communications Act of 1934 on First Amendment grounds. The applicable constitutional standard in that case was whether the statute was narrowly tailored to serve a legitimate interest (i.e., strict scrutiny). *Id.* at 125.

for companies to leave the industry in later years. Eastern and the other pre-1974 operators chose a system with no prefunding and no withdrawal liability for companies which ceased contributing to the funds as the means of providing the lifetime retiree health care they were implicitly promising to their employees. Eastern cannot reasonably ignore the history of the commitment to the miners and only look at the most recent years. As stated by the First Circuit, that view is too "crabbed" and "it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment." *Eastern Enterprises*, 110 F.3d at 158.

Furthermore, Congress found that the departure of coal companies from the coal industry was one of a number of factors which contributed to the crises of the 1990's. The legislative history of the Coal Act establishes that the roots of the crises can be traced back to the 1940's, and include a number of factors in addition to the number of companies ceasing to contribute to the funds.

> The history of the two financially troubled health care trust funds can be traced back to [the] historic 1946 agreement between the mine workers and the U.S. Government. . . . The world and the coal industry and health care in America have changed in many ways since then. Skyrocketing health care costs and a crazy quilt of court decisions on company liability have badly eroded the financial condition of the retired coal miner trust funds.

138 CONG. REC. S10,782-83 (1992) (statement of Sen. Rockefeller).[23] Still another factor which exacerbated the problem was simply the aging of the beneficiary population. *See Holland*, 102 F.3d at 738. "Many of these retirees were born in the early decades of this century. Their active days in the mines were in the 1930's and 1940's and 1950's." 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller).

F. *Eastern's Claim Of Unprecedented Arbitrariness As Applied To It Is Undercut By Its Total Domination And Control Of EACC.*

Eastern argues that its "unique circumstances" point to the "problems of unfairness" which would compel a finding that the Coal Act is unconstitutional as applied to it. To the contrary, the "unique circumstances" of Eastern show why it is more than fair that Eastern, in particular, be required to share in the cost of health care for the retired miners and their dependents assigned to it under the Coal Act.

Eastern points to its restructuring in 1966 and sale of the stock of EACC in 1987 to Peabody based on a price which "reflected the reasonable assumption that EACC would fulfill its own obligations, including those to the Benefit Plan," as demonstrating the unfairness of the statute and its retroactive effect. *Eastern's Brief* at 34-35.

As discussed above in Section 3 of the Statement of the Case, the installation of Eastern's officers to serve simultaneously as the President and directors of EACC; the funneling of EACC's net profits to Eastern totaling over $100 million; and

[23] Notably, Eastern states that "the crisis resulted from 'the practice in which existing companies dump[ed] their responsibilities onto companies that have faithfully kept their commitments.'" *Eastern's Brief* at 28 (quoting 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller)). However, Eastern misconstrued the remark. The Senator never said that the withdrawal from the industry was the *sole* cause of the crisis.

the other manifestations of the total domination and control of EACC by Eastern until the sale in 1987 along with Eastern's other ties to the industry during these years, make it more fair to view the retroactivity of this case as going back to 1987 rather than to 1965. As to the price paid by Peabody, as discussed *infra* in Section II-B-2, it reflected a very careful analysis of EACC's obligations, all of which have been fulfilled by EACC. There has been a very significant assignment of miners to EACC under the Coal Act, including many who worked for Eastern for a significant period of time. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6.[24] What EACC did not do, at any time, was to assume any obligations of Eastern under the Coal Act for the miners who worked for Eastern and never worked for EACC. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6. Eastern employed these miners and reaped enormous profits from their labors. It has had these profits since 1965 and presumably has made good use of them. But, it has not had to pay since then for retiree health care benefits for the miners to whom it implicitly promised such benefits. It is both rational and reasonable to ask that Eastern contribute to the payment for these benefits now.

II. EASTERN'S ASSESSED LIABILITY UNDER THE COAL ACT DOES NOT CONSTITUTE A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

As this Court has stated, if an economic regulation does not violate the Due Process Clause, it would be "surprising indeed" if it violated the Takings Clause.[25] *Concrete Pipe*, 508 U.S. at 642; *Connolly*, 475 U.S. at 223. The First Circuit and indeed all of the appellate courts that have addressed the issue

[24] The Social Security Administration, as of October 1, 1994, assigned 1,860 beneficiaries to EACC. *Id.*

[25] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Am. 5.

correctly determined that "[t]here are no such surprises here" and that the statute comports with the requirements of both substantive due process and the Takings Clause. *Eastern Enterprises*, 110 F.3d at 159-61. *See also Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 524-26; *Davon*, 75 F.3d at 1127-30; *Chateaugay*, 53 F.3d at 496; *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832, 838-39 (6th Cir. 1995).

In applying the Takings Clause, this Court has "eschewed the development of any set formula" and has "relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly*, 475 U.S. at 224. However, three factors are of particular significance in ascertaining the existence of a compensable taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the government action. *Id.* Examined in light of these factors, the regulatory scheme of the Coal Act does not impermissibly confiscate Eastern's property. *See Eastern Enterprises*, 110 F.3d at 159-61; *Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 524-26; *Davon*, 75 F.3d at 1127-30; *Chateaugay*, 53 F.3d at 496; *Barrick Gold*, 47 F.3d at 838-39. Each and every Circuit to review this issue has concluded that the Coal Act is a classic example of economic legislation that does not constitute a taking in violation of the Fifth Amendment. *Id.*

A. *The Character Of The Governmental Action Supports The Constitutionality Of The Coal Act.*

With respect to the character of the governmental action, the Coal Act's assignment of liability does not have the trappings of a typical Takings Clause case. *See Concrete Pipe*, 508 U.S. at 643-44; *Connolly*, 475 U.S. at 225. It does not involve real property, restrictive land use, or even a diminu-

tion in value of property. Moreover, under the Act the Government does not physically invade or permanently appropriate any of Eastern's assets for its own use. *Id.*; *Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 526; *Davon*, 75 F.3d at 1129; *Chateaugay*, 53 F.3d at 496; *Barrick Gold*, 47 F.3d at 838-39. "[A] taking is more readily found when the government 'physically invade[s] or permanently appropriate[s]' assets for its own use than when the claimed deprivation merely 'arises from a public program that adjusts the benefits and burdens of economic life to promote the common good.'" *Eastern Enterprises*, 110 F.3d at 161 (quoting *Connolly*, 475 U.S. at 225). As the Third Circuit found in *Lindsey*, the Coal Act is an economic regulation that adjusts the benefits and burdens of economic life and is essentially a tax to continue a benefits program. *Lindsey*, 90 F.3d at 695.

The Coal Act contains characteristics significantly comparable to other economic legislation that has already withstood scrutiny under the Takings Clause. *See Concrete Pipe*, 508 U.S. at 641-47; *Connolly*, 475 U.S. at 221-28; *Turner Elkhorn*, 428 U.S. at 17-18. In *Connolly*, this Court held, with respect to the MPPAA, that because "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use" the statute does not violate the Takings Clause. *Connolly*, 475 U.S. at 224. There the employer had been a signatory to a pension plan trust agreement providing essentially that the employer's obligation for pension benefits terminated when the employer made a specified contribution to the trust. *Id.* at 218 and n.2. The employer made the specified contribution and withdrew from the plan, but the MPPAA imposed additional payment obligations beyond what the employer had agreed to pay. *Id.* Nevertheless, there was no taking because:

> [T]he United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Takings Clause and is invalid on its face.

Connolly, 475 U.S. at 224-25. This conclusion regarding the MPPAA was later reiterated in *Concrete Pipe*, where this Court expressly rejected the petitioner's contention that the proper framework for judging whether the MPPAA effected a taking was that applied in cases involving appropriations of real property. *Concrete Pipe*, 508 U.S. at 543-44 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-31 (1978)).

Coal Act premiums are paid to a private benefit fund, not to a government entity.[26] *See Connolly*, 475 U.S. at 224-25. They are intended not for the government's own use, but to provide and protect health care benefits for UMWA retirees and their dependents. *Id.* The Coal Act seeks to restore financial stability and viability to multiemployer benefit plans by holding Eastern and other coal operators, who contributed to the crisis in the funds and who directly benefited from the labors of Mr. East and other miners, accountable for premiums. *See Chateaugay*, 53 F.3d at 496.

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[26] "The two UMWA funds created by the Coal Act are unique in being private plans included in the Federal budget." RA 1817. The First Circuit also recognized that the Combined Fund was a private plan. *Eastern Enterprises*, 110 F.3d at 161 ("[T]he funds collected are paid to a private benefit fund, not to a government entity").

B. *The Coal Act Does Not Unreasonably Interfere With Eastern's Investment Backed Expectations.*

The second element of the *Connolly* analysis requires a consideration of the extent to which the regulation interferes with reasonable, "distinct, investment-backed expectations." *Connolly*, 475 U.S. at 225-27.

Eastern claims that it did not consider or expect in 1965 or in 1987, that it would be required to contribute to the lifetime retiree benefits of the miners. However, Eastern's claim of lack of foresight is not the issue. It is whether Eastern's expectation that it would never have to make any further contributions for the lifetime health benefits of miners such as Mr. East and his dependents was "reasonable." *See Blue Diamond*, 79 F.3d at 525-26; *Davon*, 75 F.3d at 1128-29; *Chateaugay*, 53 F.3d at 495-96.

The First Circuit found that in the context of the intense federal interventions in the coal industry, which were often triggered by the issue of health benefits for miners, Eastern, having contributed to the expectation of lifetime benefits for miners, had reason to anticipate that it might be called upon to bear some of the burden that this expectation engendered. *Eastern Enterprises*, 110 F.3d at 161. Indeed, as shown above, this expectation engendered in miners like Mr. East and others, was no abstract assumption. Having employed Mr. East for 26 years by 1965, and profited from his labor on the implicit, but very concrete, basis that the coal operators would pay lifetime health benefits for him and his family, it was indeed unreasonable for Eastern to expect that the government would never require it to bear any further responsibility to contribute to his lifetime benefits if the funding mechanisms which Eastern had helped to put in place were not sufficient. *See id.*

1. Eastern's expectations in 1965

Eastern's claim is that by creating and capitalizing EACC, it did not expect that it would thereafter bear liabilities in the coal industry "*not related to its own prior conduct.*" *Eastern's Brief* at 48 (emphasis added). Assuming *arguendo* that this was its expectation, it is not one which was upset by the Coal Act. The Coal Act is structured so that a miner who worked for EACC for even a day would be assigned to EACC, even if he had worked for Eastern for many years previously.[27] Under the Coal Act, Eastern is liable for a miner only if the miner worked for Eastern prior to the transfer of assets to EACC. Eastern is liable under the Coal Act only for pre-1966 conduct — or, in its own words, "its own prior conduct." *See Eastern's Brief* at 48.

Therefore, the "distinct" investment-backed expectations of Eastern in the EACC spin-off were for EACC to be liable for conduct in the coal industry in 1966 and thereafter, and for Eastern to remain liable for its conduct prior thereto. Eastern cannot claim that it would have conducted itself differently with respect to EACC while it owned and dominated and controlled EACC based upon its expectations, since it apparently took all of EACC's profits in any event — profits of over $100 million (which are in excess of even Eastern's claimed liability under the Coal Act, which Respondents believe to be inflated). Assuming Eastern's own premise that the EACC reorganization was based on Eastern remaining liable for its own pre-1966 conduct, Eastern's quarrel is not actually that the Coal Act upset its expectations involved in that transaction, but that Congress never should have decided in the first place to extend responsibility under the Coal Act to its pre-1966 conduct.

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[27] This is so under the three-tier approach of 26 U.S.C. § 9706(a), since EACC was a signatory to the 1978 NBCWA and Eastern was not.

Eastern's claim that EACC took over responsibility under the Black Lung Act in the 1970s and thereafter for employees who worked for Eastern but not EACC rings hollow as to proof of the nature and intent of the parties' actions in 1966. As shown above, EACC was so totally dominated and controlled by EACC that EACC's conduct to benefit Eastern with respect to the Black Lung Act cannot be considered as proof of anything, except such domination and control.

2. Eastern's expectations in 1987

The 1987 sale of EACC stock to Peabody confirms that Eastern's investment-backed expectations were that it was to remain responsible for its own pre-1966 conduct and that its only expectation was to "shed" liabilities which arose from the conduct of EACC in 1966 and thereafter. Eastern argues that it "surely could not have expected that it would have any share of EACC's liability after transferring all of EACC's stock to Peabody in 1987." *Eastern's Brief* at 49. Again, the investment-backed expectation in question was that EACC and, indirectly, its new owner, Peabody, would bear the burden for all of EACC's liability — the liability for conduct occurring in 1966 and thereafter, and not for Eastern's pre-1966 "prior" conduct. The "distinct" investment-backed expectation in that transaction was very clearly set forth and explicitly limited to the liabilities of EACC and not to any liabilities of Eastern. This was especially so with respect to responsibility under benefit and pension plans.

The Stock Exchange Agreement is explicit as to the liabilities of Eastern for which CPC and EACC were liable. RA 2250-86. It expressly states that "CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto." RA 2260. The class

of individuals specified consisted of persons who had "retired or otherwise ceased to be employed by CPC or any of its Subsidiaries" (including EACC). RA 2116 at ¶ 22. This class of individuals did not include Eastern retirees who had never worked for CPC or EACC. Schedule 5(c) also makes reference only to a "Benefit Plan for UMWA Represented Employees of EACC and Subs" — not for Eastern employees who had never worked for EACC. *See* Schedule 5(c) to the Stock Exchange Agreement, JA 210a; RA 2298.

The 1987 Stock Exchange Agreement was based on a very careful analysis of EACC's liabilities as set forth in the agreement and was not based on any pre-1966 conduct of Eastern. JA 210a. In particular, that agreement did not contemplate that EACC was assuming any liabilities of Eastern for employees who never worked for EACC. JA 198a-210a; RA 2303-04 at ¶ 3. Again, Eastern's expectations that it would not be liable for any conduct of EACC in 1966 and thereafter were not upset. It is the Coal Act's placement of responsibility for Eastern's pre-1966 conduct on Eastern, which was not part of the 1987 transaction, about which Eastern complains.[28]

C. *The Economic Impact Of The Coal Act On Eastern Does Not Render It A Taking.*

Eastern's claim that its liability under the Coal Act amounts to $100 million is vigorously contested as being inflated.[29] In any event, the amount of the liability is not determinative of the economic impact prong. *See Concrete Pipe*, 508 U.S. at 645. "Our cases have long established that mere diminution in

[28] Eastern's speculation in footnote 57 of its brief as to what would have happened if it had "pushed up" the non-coal operations to a newly formed parental entity is just that, speculation, which assumes, without foundation, that the agreement between the parties would have remained the same despite a fundamental change hypothesized by Eastern. *See Eastern's Brief* at 48 n.57.

[29] *See Eastern Enterprises*, 110 F.3d at 160.

the value of property, however serious, is insufficient to demonstrate a taking." *Id.* Moreover, Eastern has never claimed that it would be unable to pay the premiums, or even that paying them would have a disastrous effect on the company, as other companies have claimed.[30]

"[T]he proper inquiry under the economic impact prong of the takings inquiry in a multiemployer benefit plan context is whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue." *Blue Diamond*, 79 F.3d at 525 (citing *Connolly*, 475 U.S. at 225). The assessment of premium liability under the Coal Act, like that of withdrawal liability upheld under the MPPAA, is "not made in a vacuum" and "directly depends on the relationship between the employer and the plan to which it made contributions." *Id.*

Those guidelines applied to this case compel the conclusion that Eastern is not the victim of an unconstitutional taking. Eastern is at least in part responsible for the adoption of a flawed mechanism of funding the UMWA plans that contributed to the severe financial crises which necessitated the Coal Act. *See Eastern Enterprises*, 110 F.3d at 158. In addition, Eastern's assessed premium liability depends directly on the relationship between Eastern and its former employees. Under the Coal Act, Eastern has been assigned miners who actually worked for Eastern and a proportionate number of "orphan" miners.

[30] Eastern's Chairman and CEO testified before the House of Representatives as follows: "Many of the stories being related to the Subcommittee today tell of family firms and small companies being bankrupted by the Coal Act. Many of the stories involve hardship and distress. That is not Eastern's tale. We are, fortunately, a healthy company." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Comm. On Ways and Means, 104th Cong., 2nd Sess. (June 22, 1995) (statement of J. Atwood Ives, Chairman and CEO, Eastern Enterprises).*

As the First Circuit stated,

> [T]he scheme saddles a former employer, like Eastern, with liability only for those individuals whom it employed for a relevant (and relatively long) period of time. Furthermore, a firm like Eastern, which has been out of the coal business for over a quarter-century, will be assigned workers only when no post-1977 NBCWA signatory can be found. So viewed, Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans. In situations in which a different former employer either explicitly promised benefits to a particular miner or fostered a greater expectation of benefits than did Eastern (because it employed the miner for a longer period), it will bear the concomitant burden. And, because the liability for orphaned retirees is based on the number of initial assignments made to [a signatory operator], those assignments, too, will be proportional.

Eastern Enterprises, 110 F.3d at 160-61.

The First Circuit also pointed out that, "the fact that the Coal Act contains provisions which moderate the statutory toll is also probative of a constitutionally tolerable economic impact." *Id.* at 161.

> Here, in addition to the provisions already mentioned (which relieve Eastern entirely of liability whenever a company that created a greater expectation of lifetime health benefits for an individual miner can be found), the Coal Act authorizes the use of $210 million from the 1950 Pension Plan, 26 U.S.C. § 9705, and additional moneys from the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1232(h) (1994), to defray the cost of furnishing health benefits to orphaned miners. These measures, together with the contribution proviso contained in Coal Act § 9706(f)(6), support a determination that the Coal Act does not effect a taking.

Id. The transfers from the 1950 Pension Plan thus far have entirely eliminated the unassigned "orphan" and death benefit assessments to the Combined Fund. *Eastern's Brief* at 16-17 n.32. To date, Eastern has not been required to make a proportionate payment towards the health benefit premiums of even a single orphan miner. *See Eastern's Brief* at 16-17.

D. *Analysis Of An Economic Regulation Under The Takings Clause Does Not Require Proof Of A Causal Nexus.*

Eastern argues that the Court should establish an additional test in the takings analysis for economic regulation: "whether a causal nexus exists between the appropriation and the harm that the government seeks to remedy." *See Eastern's Brief* at 37. Eastern implies that a "causal nexus" has been applied previously by the Court in cases such as this. *Eastern's Brief* at 37-43. This argument, however, attempts to shoehorn the Coal Act into something which it is not, *i.e.*, a direct and permanent appropriation of private property for the government's own use. *See Eastern's Brief* at 37-43; *See also Concrete Pipe*, 508 U.S. at 643. Eastern proposes that an analysis of the statute under the Takings Clause should include consideration of a threshold nexus requirement for economic regulation akin to the nexus requirement when tangible property is seized for government use. *See e.g., Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

The purported threshold nexus requirement is constructed, however, via a fundamentally flawed analogy between cases involving the government's direct appropriation of private property for government use,[31] and cases such as *Connolly* and *Concrete Pipe*. The latter cases involve regulatory schemes designed solely to protect private pension and benefit funds, for which there exists neither physical invasion nor permanent appropriation of any private assets for the use and benefit of the government. All of the cases Eastern attempts to marshal in favor of a threshold "nexus" requirement involve appropriation of private assets *for government use*. Nowhere has it cited, nor do this Court's decisions support, such a requirement for economic regulation that procures no largess for the government itself. *See Concrete Pipe*, 508 U.S. at 643. Therefore, Eastern's analogy cannot be sustained.

At least Davon, Inc., in its amicus brief, is more candid when it admits that it is asking the Court to add a "causal nexus" as a new standard in its analysis of the Takings Clause in cases such as this. *See Brief of Amicus Curiae, Davon, Inc.* (submitted in support of Petitioner) at 7. Moreover, even if the Court were persuaded to adopt such a nexus requirement for review of economic regulation under the Takings Clause, the required nexus between Eastern's assessed liability under the Coal Act and its contribution to the problem sought to be remedied is readily found. In short, "[t]here is no such thing as mining coal and yet having no involvement in the crisis confronting health care financing and delivery in the coal

[31] *See Dolan, supra*, (county's attempt to condition approval of construction permit upon petitioner's dedication of land for public purposes unrelated to proposed development constitutes a violation of Takings Clause); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980) (county's retention of interest earned on interpleader account in addition to fee charged for managing the account was not merely an adjustment to "benefits and burdens of economic life to promote the common good," but rather a "forced contribution to general governmental revenues").

industry." *Coal Commission Report,* JA 325a (statement of Vice Chairman Henry H. Perritt).

CONCLUSION

For all of the foregoing reasons, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp. respectfully request that this Court affirm the decision of the First Circuit Court of Appeals that as applied to Eastern Enterprises the Coal Act is constitutional under the Due Process Clause and under the Takings Clause of the Fifth Amendment.

Respectfully submitted,

JEFFERY L. KLINGER
701 Market Street
St. Louis, MO 63101
(314) 342-3400
Peabody Holding Company, Inc.

THOMAS R. GALLAGHER
600 Laidley Tower
Charlestown, WV 25324
(304) 344-0300
Eastern Associated Coal Corp.

KENNETH A. SWEDER
Counsel of Record
LAURIE M. RUSKIN
DAVID M. BELCHER
CHRISTINE R. FITZGERALD
STROOCK & STROOCK
& LAVAN LLP
100 Federal Street
Boston, Massachusetts 02110
(617) 482-6800

Counsel for Respondents

No. 97-42

(16)

JAN 30 1998

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

JOHN R. MOONEY
PAUL A. GREEN
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

PETER BUSCEMI
(Counsel of Record)
STANLEY F. LECHNER
DAVID LUBITZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 467-7190

Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), as applied to petitioner Eastern Enterprises, Inc. ("Eastern"), violates the Due Process and Takings Clauses of the Fifth Amendment, where Eastern voluntarily participated in the collectively bargained coal industry multiemployer health care funds for more than 40 years, and where the Coal Act's only imposition on Eastern is to require it to provide for the future health care of some of Eastern's own retirees, all of whom left covered service in the coal industry years ago, worked for Eastern longer than they worked for any other signatory employer still in business, and continued, throughout the years until the Coal Act was passed, to receive health benefits from the multiemployer funds in which Eastern participated.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were the UMWA Combined Benefit Fund and its Trustees (Marty D. Hudson, Thomas O. S. Rand, Elliot A. Segal, Carlton R. Sickles, Gail R. Wilensky, Michael H. Holland, and William P. Hobgood), and Peabody Holding Company, Eastern Associated Coal Corp., and Coal Properties Corp. All of these parties are respondents in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-42

EASTERN ENTERPRISES,
Petitioner,
v.
KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS THE UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-23) is reported at 110 F.3d 150. The district court's judgment and order (Pet. App. A-24 to A-27) are not reported. An earlier opinion by the district court (Pet. App. A-28 to A-38) is reported at 942 F. Supp. 684.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h), which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-3056. The entire statute, as it appears in the Statutes at Large, is reproduced in the appendix to the brief in opposition filed by the UMWA Combined Benefit Fund and its Trustees. Combined Fund App. 1a-39a.

STATEMENT OF THE CASE

A. Introduction And Summary

This case arises out of congressional action taken in 1992 to preserve a private medical care program for more than 100,000 retired and disabled coal miners and their families. The retired and disabled miners in question worked primarily in underground bituminous coal mines in Appalachia during the decades from the 1930s to the 1980s. The beneficiaries include thousands of miners with crippling mine-related injuries, and their spouses, widows, and other dependents. Many of the retirees worked in the mines during "the days of the pick and shovel and dynamite, when cave ins were not uncommon and methane explosions often brought sudden disaster." 138 Cong. Rec. S17,633 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). The average age of the Combined Fund's beneficiary population, including dependents, is 75. Approximately 40 percent of the beneficiaries are over 80.

For more than 40 years, these retired and disabled miners and their families, many of whom live in remote mining communities with limited health care facilities, received medical care benefits from a private multiemployer benefit system—the United Mine Workers of America ("UMWA") Health and Retirement Funds (the "Funds"). Petitioner Eastern Enterprises, Inc. ("Eastern"), together with hundreds of other unionized coal companies signatory to labor agreements with the UMWA, voluntarily participated in and benefited from this multiemployer medical care system for four decades. From the Funds' creation in 1946 until Eastern sold its coal operations in 1987, Eastern, which held itself out as the fifth largest coal company in the United States (R 574), employed thousands of coal miners in West Virginia and Pennsylvania.[1] Toiling underground in working conditions both difficult and dangerous, these miners generated substantial

[1] "R" refers to the parties' Joint Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court. "JA" refers to the Joint Appendix in this Court.

profits for Eastern, while earning wages and service credits toward their pensions and retiree health benefits. After serving at least 20 years in the mines and reaching age 60 (later reduced to age 55), or after being totally disabled in a mine accident, Eastern's miners were eligible to retire and receive medical care from the Funds for themselves and their dependents. R 892-93, 1215. The availability of health and retirement benefits was a remarkable achievement for coal miners in the 1950s. Prior to that time, "you couldn't find a retired coal miner. He worked until he died or got killed in the mines." R 909.

In the late 1980s, however, the UMWA health care Funds were on the verge of financial collapse. Due to rapidly escalating health costs and a declining contribution base of unionized employers, the Funds were facing a projected deficit of $300 million by 1993, and the multiemployer benefit system was in serious jeopardy. JA 236a. Congress held hearings and considered numerous recommendations and legislative proposals, including the findings and recommendations of a bipartisan Coal Commission appointed by Secretary of Labor Elizabeth Dole. After three years of deliberation, Congress adopted the Coal Act, which preserves the private multiemployer fund system, safeguards the hard-earned medical benefits of retired miners, and imposes liability only on those employers, like Eastern, that had voluntarily participated in, and benefited from, the multiemployer health care system in the past, and that still had former employees receiving benefits from that system when the Coal Act was passed.

The Coal Act apportions liability on a "pay for your own" basis. It does so for all signatory employers that remain in business, without regard to whether they did or did not continue contractual contributions through the time of the statute's enactment. In Congress' judgment, the companies that voluntarily participated in the UMWA Funds over the years and formerly employed the retirees in question are the companies that are most responsible for the retirees' eligibility to receive health care from the

UMWA multiemployer system and the companies that should shoulder the costs of such care. The basic rationality of this "pay for your own" system is totally obscured by the misleading submissions of petitioner Eastern and the *amici* supporting Eastern.

In accordance with Section 9706 of the Coal Act, the Secretary of Health and Human Services assigned Eastern responsibility for paying medical costs for certain specific former Eastern employees (and their surviving spouses and dependents) who were continuing to receive health benefits from the UMWA Funds. Eastern was *not* assigned liability for any retiree who had not worked for Eastern, or for any so-called "orphan" miners who formerly worked only for employers no longer in business. Eastern concedes this point in its brief. Pet. Br. 15-16 n.32.

Beginning in November 1993, Eastern initiated a three-prong legal attack in the United States District Court for the District of Massachusetts to avoid paying for the beneficiaries assigned to it. Eastern contended, first, that the Secretary of HHS incorrectly assigned beneficiaries to Eastern; second, that if the assignments were correct, the Coal Act is unconstitutional; and third, that if the assignments were correct and the Coal Act is valid, Eastern is entitled to be indemnified for its Coal Act liabilities by the company (Peabody Holding Co.) to which Eastern sold its coal mining subsidiary in 1987.

While the case was pending in the district court, Eastern sought administrative review of the Secretary's assignment of beneficiaries, asserting that the beneficiaries should have been assigned to Eastern's former coal mining subsidiary, Eastern Associated Coal Corp. ("EACC"), even though the beneficiaries in question never worked for EACC or for EACC's current owner, Peabody. In January 1995, the Social Security Administration ("SSA") issued a final determination on Eastern's request for administrative review of the assignment of two beneficiaries—Samuel and Josephine East. R 602-03. Samuel East was a coal miner

who worked as a hand loader and cutting machine operator for Eastern for 26 years, from 1934 to 1960. JA 142a, 216a. In total, during his career, Mr. East worked in coal mines for 41 years, first in Alabama from 1926 to 1934, and then in West Virginia until he retired at age 62 in 1967. JA 212a, 216a. Mr. East received health benefits from the UMWA Funds until his death in 1984, and his widow Josephine was a beneficiary of the Funds at the time the Coal Act was passed. JA 216a-217a; R 2325. When SSA announced its final determination concluding that Mrs. East was properly assigned to Eastern, the agency's ruling necessarily rejected Eastern's across-the-board argument that all of its former employees and their dependents should have been assigned to EACC. The parties therefore treated the SSA determination as a "test case" and proceeded to litigate Eastern's statutory challenge on that basis.[2]

Both the district court and the court of appeals rejected Eastern's statutory argument that the Secretary's assignment of liability to Eastern was based on an erroneous interpretation of the Coal Act. Pet. App. A-6 to A-9, A-26 to A-27, A-32 to A-35. Eastern has abandoned that argument in this Court, and the propriety of the Secretary's assignments to Eastern is no longer at issue. Eastern's third-party claim for indemnification was stayed in the district court pending appellate review of Eastern's constitutional claims. Pet. App. A-27.

After full briefing and oral argument, the court of appeals upheld the constitutionality of the Coal Act as applied to Eastern. Pet. App. A-9 to A-23. Applying precedent from this Court under both the Due Process

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[2] Although Samuel East's employment records show that he worked for Eastern for 26 years (*i.e.*, from 1934 to 1960), the court of appeals referred in its opinion to only the last 14 of these years (*i.e.*, 1946 to 1960). *See* Pet. App. A-5 to A-6. This was because, in making the assignments, SSA traced Mr. East's employment history back only to 1946, the year in which the UMWA multiemployer health care system was created. JA 220a.

and Takings Clauses, the court of appeals concluded that "[t]he Coal Act was motivated by a legitimate legislative purpose; the assignment system which it created lies within the wide universe of rational measures that were available to Congress as vehicles for furthering that purpose; and the statutory scheme, as applied, does not impermissibly confiscate Eastern's property." Pet. App. A-23. The court's holding and reasoning are fully in accord with similar rulings and comprehensive opinions from the Second, Third, Fourth, Sixth, and Seventh Circuits, all of which have rejected constitutional challenges to the Coal Act.[3]

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[3] *See LTV Steel Co. v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir.), *cert. denied*, 117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996).

In addition, a number of district courts have sustained the Coal Act against constitutional attacks. *Lone Star Steel Company v. Chater*, C.A. No. 3:94-CV-652-R (N.D. Tex. Aug. 30, 1996); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996); *Holland v. Imperial Colliery Co.*, C.A. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995); *Bellaire Corp. v. Chater*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997); *Associated Electric Cooperative, Inc. v. Hudson*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997); *Association of Bituminous Contractors v. Shalala*, 1997 U.S. Dist. LEXIS 14298 (D.D.C. Apr. 21, 1997), *appeal pending*, No. 97-5132 (D.C. Cir. docketed May 27, 1997); *Unity Real Estate Co. v. Hudson*, 977 F. Supp. 717 (W.D. Pa. 1997), *appeal pending*, No. 97-3234 (3d Cir. docketed Apr. 30, 1997); *Barnes & Tucker Co. v. Hudson*, 1997 U.S. Dist. LEXIS 14390 (W.D. Pa. Mar. 18, 1997), *appeal pending*, No. 97-3236 (3d Cir. docketed Apr. 30, 1997); *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366 (E.D. Va. 1997), *appeal pending*, No. 97-2331 (4th Cir. docketed Sept. 30, 1997); *Canyon Coals, Inc. v. Holland*, No. 4:94-CV-19-M (W.D. Ky. Sept. 3, 1997); *The Pittston Company v. United States*, C.A. No. 3:97CV294 (E.D. Va. Sept. 11, 1997); *Drydock Coal Co. v. Shalala*, C.A. No. C2-94-927 (S.D. Ohio Nov. 13, 1997); *Holland v. Robert Coal Co.* 1997 U.S. Dist. LEXIS 18922 (D.D.C. Nov. 17, 1997); *Holland v. Cardiff Coal Co.*, C.A. No. 1:96-0310 (S.D. W. Va. Dec. 17, 1997).

In attempting to distinguish itself from the many companies whose attacks on the Coal Act have been rejected, Eastern makes a series of erroneous statements and conclusory assertions that create a misleading impression of the historical background of the statute and Eastern's participation in the coal industry. At the same time, several of the very companies from which Eastern seeks to distinguish itself have filed amicus briefs in this Court, seeking to align themselves with Eastern and contend, notwithstanding the outcomes of their own litigation, that the Coal Act is invalid as applied to them as well.[4] Among other things, Eastern erroneously states that it departed the coal industry more than 30 years ago; attempts to conceal its 41-year history of voluntary participation in the Funds; ignores the findings of Congress, the Coal Commission, and several courts, that coal industry retirees had legitimate expectations of receiving medical benefits from the Funds during their remaining years; erroneously suggests that Congress' authority in imposing Coal Act liability is limited to "blameworthy" companies that dumped their retirees into the Funds; and ignores the central concept of liability underlying the Coal Act—"pay for your own" retirees in the multiemployer health care system.

To set the record straight and put this case in proper context, we respond to many of the factual inaccuracies in Eastern's submission, summarize the history of federal involvement in coal industry medical care, describe Eastern's 41-year participation in the UMWA Funds, and set

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[4] LTV and Davon lost in the district court and the court of appeals, and this Court denied certiorari. Bellaire and Allied Signal lost in the district court and chose not to appeal. Unity, Barnes & Tucker, and Mary Helen lost in the district court, and their appeals are pending. Pittston's constitutional challenge was dismissed on res judicata grounds in the district court, and the judgment has not yet become final. *See* note 3, *supra*.

forth Congress' rationale in assigning Coal Act liability to former signatory employers such as Eastern.

B. The Coal Act And Its Historical Background

Of the many cynical and artificially isolationist statements that Eastern makes, one of the most egregious is the assertion that it was "entirely unforeseeable" that Congress would choose to intervene to avert the collapse of the UMWA multiemployer health care system and the disruptive impact that such a collapse inevitably would have had on the coal industry and the economy as a whole. Eastern simply ignores the special health concerns facing retired coal miners and their families,[8] the resulting significance of retiree health care issues in collective bargaining, the long history of federal regulation of coal miner health issues, and the unique involvement of the federal government in the UMWA multiemployer system. Eastern also disregards the predictable effect on a multiemployer system of decades of employee accumulation of service credits toward retiree health care eligibility, based on employment with hundreds of constantly changing coal companies, many with deliberately obscure or complex corporate affiliations and ownership structures, and many having passed out of existence or left the coal business long before their former employees' health care benefits had been provided.

[8] The Annual Reports of the UMWA Health and Retirement Funds include letters from beneficiaries and articles showing the hazards of coal mining, the health problems facing miners and their families, and the role the Funds have played in providing benefits in times of need. *See, e.g.*, R 948 ("lost an arm and a leg in the coal mines of West Virginia"), R 991 ("stream of casualties from the surrounding mines—men with backs or limbs broken, bashed chests or other injuries"), R 993 ("22 men were trapped and killed in an early morning explosion . . . . In this same pit 37 died last year"), R 1025 ("75 children and 16 windows left by mine tragedy"), R 1087 ("How could we, retired coal miners from the old days, meet the disastrous events of sickness without the Welfare and Retirement Fund's help?"), R 1101 ("Another victim of the mine explosion was Virgil Tanner. His widow was left destitute").

Like other employers that have challenged the validity of the Coal Act, Eastern would prefer to have nothing to do with its former employees. For Eastern, it is a matter of supreme indifference whether those retirees and their families manage to obtain health care financed by other employers or whether they simply fend for themselves. As long as Eastern is not involved, it is satisfied. Fortunately, neither Congress nor the courts below shared this view. With some 1400 former employees and dependents still receiving benefits from the UMWA multiemployer system when the Coal Act was passed, Eastern pretends to be shocked that Congress could conclude that Eastern should bear some measure of responsibility for the Funds' financial crisis. The court of appeals was unimpressed by Eastern's effort to "feign astonishment . . . ." Pet. App. A-22. As the court explained, "[h]aving contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." *Id.*

Although we do not repeat all of the historical evidence that supports the court of appeals and contradicts Eastern, we summarize the salient factors supporting the decision below.

1. *Establishment Of The UMWA Multiemployer Health Care System*

Coal mining is a hazardous occupation that has resulted in special regulation by the federal government, beginning with the establishment of the Bureau of Mines in the Department of the Interior in 1910. S. Rep. No. 91-411, at 3 (1969) *reprinted in* 1 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., Federal Coal Mine Health and Safety Act of 1969 and Amendments (1975). The health-related hazards associated with coal mining are magnified in the eastern bituminous coal fields, where the oldest and highest quality coal is found in deep underground mines in isolated

rural areas. JA 250a. Historically, these areas of Appalachia did not attract many doctors or medical professionals, and health care left much to be desired. JA 261a-264a. The death rate for coal miners in 1946 was 50 percent higher than the death rate for the population as a whole. R 1919.

The mine workers' union, the UMWA, began pressing for medical reform in the 1930s and 1940s. In 1946, when coal operators rejected the union's demands for a health and welfare fund for miners, the union struck. To end the strike and avoid further disruption in the economy, President Truman directed Secretary of the Interior Krug to seize the mines and negotiate with the union. 11 Fed. Reg. 5593 (1946). The negotiations culminated in the historic Krug-Lewis Agreement between the federal government and the UMWA. The Agreement provided various health and retirement benefits to UMWA members and their dependents and survivors, financed by mandatory contributions from signatory employers and wage deductions. JA 261a-263a. The Agreement, executed at the White House on May 29, 1946, created the UMWA multiemployer health and retirement fund system. R 610-14.

Under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. JA 263a. At the request of Secretary Krug, the survey was conducted and a report prepared by Rear Admiral Joel T. Boone of the United States Navy Medical Corps. The report found that medical care in many mining communities was a "disgrace to [the] nation" and "in many instances deplorable." *Id.* at 263a-264a.

2. *Development Of The UMWA Multiemployer System And Continued Federal Involvement*

Although the mines were returned to private control in 1947, it did not end the federal government's involvement with the coal industry or its multiemployer benefit fund. On March 23, 1948, President Truman issued Executive Order No. 9939, creating a Board of Inquiry to look into a nationwide work stoppage in the coal industry, which had been precipitated by the inability of the union and management trustees to agree on the administration of retirement benefits. 13 Fed. Reg. 1579 (1948). In accordance with the suggestion of Speaker of the House Joseph Martin, Senator Styles Bridges of New Hampshire was appointed as neutral trustee. Senator Bridges introduced a plan that, among other things, set eligibility for retirement benefits at age 62 with 20 years of service. This plan was approved by UMWA-appointed Trustee John L. Lewis, and the fund's eligibility criteria for retiree benefits were established.[6] JA 264a.

In 1950, the UMWA and the coal operators created a new multiemployer fund called the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"), which succeeded to the assets and liabilities of the prior fund. R 635-46. The 1950 W&R Fund provided health and retirement benefits to UMWA miners and "their families and dependents," and included "benefits on account of sickness, temporary disability, permanent disability, death or retirement . . . ." R 639. Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effectively applied only to the 1950 W&R Fund. JA 266a. *See* 26 U.S.C. § 404(c) (1954).[7]

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[6] Trustee Owen, the operator-appointed trustee, unsuccessfully challenged Senator Bridges' plan in court. *See Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948).

[7] In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the productive facilities of the industry." S. Rep. No. 83-1622, at 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 4687. *See also* H.R. Conf. Rep. No. 83-2543, at 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

To provide better medical care in rural coal mining communities, the 1950 W&R Fund financed the construction of 10 hospitals in Kentucky, Virginia, and West Virginia. JA 265a. These hospitals, which opened in 1955 and 1956, were dedicated as "memorial hospitals in the memory of those men who died without hospitals, and without proper medical attention . . . ." R 919, 920. The hospitals faced financial difficulties in the 1960s. With $8 million in assistance from the federal government, the hospitals were sold to a regional authority established by the United Presbyterian Church, U.S.A., which continued their operation.[8] Although the hospitals were no longer owned by the 1950 W&R Fund, they continued to provide medical services to active and retired miners and their dependents, and the Fund reimbursed the hospitals for the medical care provided to Fund beneficiaries. JA 267a.

In 1969, to further address the health-related problems of coal mining, Congress enacted the Federal Coal Mine Health and Safety Act. Among other things, this statute established health and safety standards for coal mines, required medical tests for miners, and created a federal Black Lung program to provide benefits to miners disabled with pneumoconiosis, and their survivors.[9] The statute has been amended several times, including the Black Lung Benefits Revenue Act of 1977, which modified the system for paying Black Lung benefits. *See* Pub. L. No. 95-227, 92 Stat. 11 (1977).

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[8] With the support of Assistant Secretary of Labor Daniel Patrick Moynihan and the personal involvement of President Kennedy (JA 267a), federal government assistance came in the form of a $3.9 million grant in June 1963, and a $4.1 million loan in June 1964. Congressional Research Service, The Library of Congress, *Policy Precedents for Federal Involvement in Coal Health Matters*, CRS-5 to 6 & n.10 (Oct. 4, 1990). In 1972, Congress forgave the government's loan. Priv. L. No. 92-161.

[9] *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 and Amendments*, 94th Cong., 1st Sess. (Comm. Print 1975). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

In 1974, partly in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), the coal operators and the union divided the 1950 W&R Fund into four separate multiemployer plans, two of which (the 1950 Benefit Trust and 1974 Benefit Trust) provided health benefits to retired miners. R 747-49. In 1974, Congress again enacted special provisions in the Internal Revenue Code, uniquely applicable to the UMWA Funds, to alleviate the potential tax burdens that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier—*i.e.*, supporting the viability of a private multiemployer system that originally was created through government intervention. *See* 26 U.S.C. §§ 277, 404(c).

3. *Financial Crisis And Appointment Of The Federal Coal Commission*

In 1989, after the expiration of the National Bituminous Coal Wage Agreement ("NBCWA") of 1984, a bitter and protracted labor dispute developed between the UMWA and the Pittston Coal Company, a major coal producer. The dispute, which resulted in a 10-month strike, centered on the funding of health benefits for retired coal miners and their dependents. Pittston refused to contribute to the multiemployer benefit funds and cut off health benefits to retirees in its individual company plan. In October 1989, Senators Rockefeller, Byrd, and Heinz introduced S.1708, the Coal Industry Health Benefits Stabilization Act of 1989. *See* 135 Cong. Rec. S12,313, S12,340 (daily ed. Oct. 2, 1989). Identical legislation was introduced in the House of Representatives on October 5, 1989. *See* 135 Cong. Rec. H6987 (daily ed. Oct. 12, 1989).[10]

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[10] Pittston's cut-off of contributions and retiree health benefits was symptomatic of a broader problem. As noted by Senator Heinz, "we are sitting on a time bomb and already 16 coal companies have

While Congress deliberated and collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the Pittston dispute, Secretary Dole established on March 12, 1990 a special bipartisan advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). JA 232a. The Secretary authorized the Coal Commission to analyze and make recommendations regarding the UMWA multiemployer health care system, including arrangements to assure its long-term financial viability. JA 232a. Former Labor Secretary Usery was appointed Chairman of the Coal Commission.

The Coal Commission submitted its findings and recommendations to Secretary Dole in November 1990 in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People." JA 231a-344a. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

JA 274a. The Coal Commission found that retired coal miners had legitimate expectations of receiving health care for life but that that expectation was in peril:

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise

gone back on the promises made to miners by ending all contributions to the [UMWA] health benefit funds." 135 Cong. Rec. S12,340 (daily ed. Oct. 2, 1989). The proposed legislation provided incentives for coal producers to remain signatory to agreements requiring contributions to the benefit funds, and disincentives to discourage companies from withdrawing from the benefit funds.

> they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

JA 245a-246a.[11] The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." JA 246a.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." JA 246a.[12] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Third, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.* In light of these facts, and in light of its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. JA 247a.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis. JA 248a. By its very nature, collective bargaining could address only those employers that were still mining coal and were still doing so

[11] Similarly, the Commission explained in its Executive Summary that "[t]he Commission firmly believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored." JA 237a.

[12] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, by 1990 companies making contributions to the UMWA Benefit Funds accounted for only 30 percent of national coal production. JA 246a.

with employees represented by the UMWA. Such bargaining could not hope to deal with the many former employers (such as petitioner Eastern, which had sold its coal mining subsidiary in 1987) that were out of the coal business or otherwise were no longer making contributions to the UMWA Funds to pay for the medical costs of their own retirees who were still receiving benefits from the Funds. In fact, by the 1990s, approximately 75% of the beneficiaries of the 1950 Benefit Trust and the 1974 Benefit Trust had no employment connection to any of the companies that were still contributing to the Funds.[13] Accordingly, the Commission recommended two alternative statutory approaches.

The Coal Commission's first approach called for the creation of a quasi-governmental corporation funded by an industry-wide assessment on all coal operators to finance the health care of UMWA orphan retirees, and a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. JA 307a-310a. The second approach called for the creation of a single, private multiemployer plan, financed by a broadened base of present and former NBCWA signatories, to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. JA 312a-316a. The second approach recommended by the Coal Commission specifically was designed to include a broadened group of former signatories such as petitioner Eastern:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts,* establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be identified through a chain of succession to a current operator.

JA 312a (emphasis added).[14]

[13] *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong. 45 (1991) (testimony of Michael K. Reilly, President of Bituminous Coal Operators' Association, Inc.) ("for every dollar that signatory companies contribute for their own people, the same companies contribute $3 for retirees from companies no longer contributing").

4. *Enactment Of The Coal Act*

Following the Coal Commission's Report, Congress undertook its own intensive examination of the crisis. Initially, a hearing on the Coal Commission Report was held.[15] Thereafter, Senator Rockefeller introduced the Coal Industry Retiree Health Benefit Act of 1991 ("S. 1989"). S. 1989 adopted the first funding approach that had been advocated by the Coal Commission, albeit in a slightly modified form. It included a combination of an industry-wide assessment on all coal operators and a per-beneficiary premium on employers that had signed the 1978 or later NBCWAs.[16] This financing scheme was slightly altered and passed by Congress on March 20, 1992, as part of the sweeping Tax Fairness and Economic Growth Acceleration Act of 1992.[17] President Bush

[14] Eastern erroneously implies (Pet. Br. 12) that the Coal Commission sought funding contributions only from 1978 or later NBCWA signatories. That is not accurate. The Coal Commission's second funding mechanism contemplated contributions from *all* NBCWA signatories, and was not limited to companies that signed NBCWAs in 1978 or later. JA 312a, 313a, 314a. As the Commission stated in the Executive Summary of its report, "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement." JA 237a.

[15] *See Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcomm. On Medicare and Long-Term Care of the Senate Comm. On Finance*, 102d Cong. (1991).

[16] S. 1989, 102d Cong. §§ 9701, 9704(g), 9723(6) (1991), *reprinted in* 137 Cong. Rec. S17,063-71 (1991).

[17] H.R. 4210, 102d Cong. (1992), *reprinted in* H.R. Conf. Rep. No. 102-461 (1992). Under this measure, different rates of assess-

vetoed this tax legislation. His veto message to Congress said nothing about the bill's provisions regarding retiree health care in the coal industry.[18]

Congress substantially revised the proposed financing scheme before the Coal Act was enacted into law. Instead of an industry-wide assessment on all coal operators, Congress adopted a funding mechanism that requires payments only from employers that were signatory to one or more NBCWAs. This financing arrangement is similar to the second approach that was recommended by the Coal Commission. Congress decided to impose liability not on all coal industry employers, but only on those employers that actually employed the retirees in the past under UMWA collective bargaining agreements:

> The essence of the Conference Agreement is that those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements.

138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992).[19]

In enacting the Coal Act, Congress found that

> it is necessary to modify the private health care benefit plan structures for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

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ment were to have applied to the eastern and western components of the coal industry. *Id.* at 275.

[18] *See* 28 Weekly Comp. Pres. Doc. 510 (March 20, 1992).

[19] As noted by Senator Rockefeller, "[t]he approach of the current legislation was not lightly arrived at. Lengthy and difficult negotiations were required because of the myriad of conflicting interests in our nationwide coal industry." 138 Cong. Rec. S10,783 (daily ed. July 29, 1992). *See also* 138 Cong. Rec. S17,605 (daily ed. Oct. 8, 1992) ("The method of assignment of eligible beneficiaries was the source of much debate and controversy prior to the Conference Agreement.").

Combined Fund App. 1a.[20] Congress stated that the policy of the Coal Act is

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Id.

The allocation of liability under the Coal Act is based on the fundamental principle that employers should pay for the retiree health care of their own former employees that were still receiving health benefits through the UMWA system. As Senator Rockefeller explained,

> Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.

138 Cong. Rec. S17,633 (daily ed. Oct. 8, 1992).

Congress implemented this "pay for your own" policy in three ways in the Coal Act. First, and most relevant here, Congress created a new trust fund, the Combined Fund, to provide health and death benefits to surviving coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Trusts. 26 U.S.C. § 9703(a), (b)(1), (e), (f). To apportion the cost of these benefits, Congress directed the Secretary of HHS (now, the Commissioner of Social Security)[21] to

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[20] "Combined Fund App." refers to the appendix to the Combined Fund's brief in opposition to Eastern's petition for a writ of certiorari.

[21] Effective March 31, 1995, Congress transferred the Secretary's duties under the Coal Act to the Commissioner of Social Security ("Commissioner"). *See* 26 U.S.C. §§ 9704, 9706 (historical notes); Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9), 108 Stat.

assign to signatory operators certain of their former employees who were among the Combined Fund's beneficiaries. *See* 26 U.S.C. §§ 9704, 9706.

Under the detailed statutory criteria governing these assignments (*see* 26 U.S.C. § 9706(a)), the Secretary was required to assign as many beneficiaries as possible to employers that signed the NBCWA or other coal wage agreement in 1978 or thereafter. Only if a retiree was never employed by a 1978 or later signatory, or if any such signatory that did employ the retiree was no longer in business, could the Secretary turn to earlier NBCWA signatories.[22] Each employer's annual health premium to

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1464, 1472, 1487-88 (1994). Accordingly, the Commissioner has been substituted for the Secretary in this case.

[22] Specifically, the Secretary first was required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a)(1). If the Secretary could not assign a retiree to a coal operator pursuant to this first method, she next was required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA, and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. 26 U.S.C. § 9706(a)(2). Third, if the Secretary could not assign a retiree to a coal operator pursuant to the first two methods, she was required to assign the retiree to the pre-1978 signatory operator that employed the retiree for the longest period of time. 26 U.S.C. § 9706(a)(3). If the Secretary could not identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining in business) and that formerly employed a particular retiree, the retiree was designated an "unassigned beneficiary." 26 U.S.C. §§ 9704(d), 9705.

Under these provisions, for example, a retiree who worked for Eastern for 20 years, and then worked for EACC for one day and retired, would be assigned to EACC and not Eastern because EACC is a post-1978 signatory still in business. Indeed, approximately half of the Combined Fund beneficiaries assigned to EACC retired prior to 1975 and thus necessarily accumulated most of their required 20 years of covered service while working for employers other than EACC (since, by Eastern's own admission, EACC did not operate Eastern's coal business until 1966).

the Combined Fund is then computed as the product of the number of the employer's assigned beneficiaries times the annual per beneficiary premium established by the Secretary under Section 9704(b)(2) of the Coal Act. *See* 26 U.S.C. § 9704(b)(1), (2).[23]

The second and third methods by which Congress implemented its "pay for your own policy" do not involve Combined Fund beneficiaries and have not been challenged by Eastern. They relate to the individual employer plans addressed in Section 9711 of the statute (26 U.S.C. § 9711) and to the UMWA 1992 Benefit Plan (the "1992 Plan"), which is a separate new trust fund created by the Coal Act. 26 U.S.C. § 9712.

In Section 9711, Congress required that all employers that, as of February 1, 1993, were providing health coverage to their own retirees and dependents under a contractual individual employer plan continue that plan for those beneficiaries for as long as the employer (or any related person) remains in business. Eastern is not affected by this requirement, because it was not maintaining a contractual individual employer plan as of February 1, 1993.

Congress designed the 1992 Plan to provide health benefits to eligible retirees who retired on or before September 30, 1994, are not beneficiaries of the Combined Fund, and are not receiving health coverage directly from their former employers. With respect to the 1992 Plan, Congress implemented the "pay for your own" principle

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[23] By its very nature, the Combined Fund is a "closed fund" into which no new retirees can be added. The Combined Fund's beneficiary population was fixed by reference to the beneficiary populations of the 1950 Benefit Trust and the 1974 Benefit Trust as of the statutorily prescribed date of July 20, 1992. As such, the Combined Fund's beneficiary population is steadily declining. Given the average age of the beneficiaries, the rate of decline is significant. When the Combined Fund began providing health benefits on February 1, 1993, its beneficiaries numbered nearly 109,000. As of December 31, 1997, that number had declined to just under 75,500.

by requiring the last signatory operator to which each 1992 Plan beneficiary is attributable to pay a monthly per beneficiary premium to cover the cost of that beneficiary's health care. *See* 26 U.S.C. § 9712(d)(1)(b), (3). Eastern has not been assessed any premiums for the 1992 Plan.

Under the Coal Act, Congress adopted different methods of providing for orphan beneficiaries in the Combined Fund and the 1992 Plan. In the Combined Fund, the cost of financing health care coverage for orphan retirees and their dependents (*i.e.*, beneficiaries who could not be assigned to any former employer) is to be shared on a proportionate basis by the employers that voluntarily participated in the UMWA multiemployer health benefits system and that have been assigned Combined Fund beneficiaries under the criteria set forth in Section 9706. The statute provides for an "unassigned beneficiaries premium," to be allocated among signatory operators on the basis of their pro rata share of the beneficiaries that have been assigned. 26 U.S.C. § 9704(d).[24]

To help alleviate the financial burden of health care for unassigned Combined Fund beneficiaries, Congress authorized three transfers of $70 million each to the Combined Fund from the UMWA 1950 Pension Plan and Trust ("1950 Pension Trust"). These transfers were made on the first day of each of the Combined Fund's first three fiscal years, and the retirees themselves thus helped to finance their own future health care. 26 U.S.C. § 9705. Thereafter, Congress authorized additional annual transfers, to be made from the Abandoned Mine Reclamation Fund established under the Surface Mining Control and Reclamation Act of 1977. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h) (1994). These transfers, the

[24] In the 1992 Plan, the cost of providing health care to beneficiaries for whom the Trustees do not receive monthly premiums from the beneficiaries' last signatory employer is covered by an annual assessment imposed only on signatories of the 1988 NBCWA. *See* 26 U.S.C. § 9712(d)(1)(A).

first three of which have amounted to more than $110 million, may be used only to defray the expense of providing health benefits to unassigned beneficiaries. To date, these transfers have completely offset the orphan beneficiary health care costs, and no assigned operator (including Eastern) has had to pay a penny for any orphan beneficiary. R 1907.

C. Eastern's 41-Year Participation In The UMWA Multiemployer Funds

Eastern repeatedly asserts in its brief to this Court that it "ceased coal operations" in 1965 and thus had been out of the coal business for "nearly thirty years" when the Coal Act was passed. This is a gross distortion. Eastern admits that its Coal Division became a wholly-owned subsidiary of Eastern in 1965 and continued to mine coal and generate substantial profits for Eastern until it was sold in 1987, but Eastern nevertheless proceeds as if its last 22 years of coal mining are irrelevant and should be ignored.

Eastern's assertions attempt to conceal Eastern's history as a major coal producer; its 41-year voluntary participation in, and benefit from, the UMWA multiemployer fund system; and Eastern's role in contributing to coal miners' expectations that, once they retired after 20 years in the mines, they would continue to receive health benefits from the UMWA multiemployer system.

1. *Eastern's Coal Operations From 1929 To 1987*

Eastern Gas and Fuel Associates, later known as Eastern Enterprises, was organized as a Massachusetts business trust in 1929. According to Eastern's records, it began mining and selling coal in 1929, as soon as the company was formed. R 277.

Eastern was a major coal producer and coal exporter. From 1962 through 1966, for example, it sold more than 50 million tons of coal from its own production, and nearly 20 million tons produced by other companies. R 269. In 1964, it received an award from the Department of Commerce as the leading United States producing

exporter of coal. R 269. Eastern repeatedly described itself as one of the largest coal producers in the United States. R 265, 376, 574.

Eastern's coal mining operations were located in West Virginia and Western Pennsylvania. R 271-74. It operated deep underground mines and employed thousands of UMWA-represented coal miners. R 269, 276. In the 1970s, for example, Eastern's coal mining operations employed approximately 4700 miners who were members of the UMWA. R 521.

Eastern tells this Court that it ceased coal operations in 1965, but that is not what it told Eastern's shareholders. In annual reports of Eastern Gas and Fuel Associates in the 1970s and 1980s, Eastern highlighted the substantial revenues produced by its coal subsidiary, EACC, which for many years generated for Eastern far greater revenues than its sister subsidiary, Boston Gas.[25] Eastern admits that between 1966 and 1987 its coal subsidiary produced for Eastern more than $100 million in dividends. Pet. Br. 6 n.13. In addition, the annual reports of Eastern Gas and Fuel Associates for this period are replete with references to "our" coal operations, include pictures of coal mining equipment, and provide financial data on coal-generated production and revenues. They do not depict a company that has "ceased" its coal operations.[26]

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[25] Annual reports for Eastern Gas and Fuel Associates for the years 1970, 1974, and 1980 were produced during discovery and have been lodged with the Clerk. From 1970 through 1974, Eastern's total coal revenue was $888 million, and its total gas revenue was $487 million. 1974 Ann. Report at Bates No. ET 005097. In other words, EACC generated nearly twice as much revenue as Boston Gas during those years and obviously was quite important to Eastern's shareholders. In a March 12, 1981 letter to shareholders, the President and CEO of Eastern Fuel and Gas Associates boasted of productivity gains in "our West Virginia coal operations," and stated that during the coming year "we expect to approach the 10 million ton level" of coal production. 1980 Ann. Report at Bates No. ET 004631.

[26] Contrary to the suggestions by Eastern in its brief, it is not necessary for the Court to "pierce the corporate veil" to consider the coal-related activities and coal-generated revenue of Eastern's wholly-owned subsidiary from 1966 to 1987. This is not a case involving principles of corporate law, and the Constitution does not limit Congress' legislative power by the manner in which multi-billion dollar conglomerates choose to structure their corporate formalities. *See, e.g.*, ERISA and Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), in which Congress imposed "control group" liability on sponsors of both single employer and multiemployer pension plans. 29 U.S.C. § 1301(b)(1).

2. *Eastern's Participation In, And Benefit From, The UMWA Funds*

Initially through its Coal Division and then through its wholly-owned coal subsidiary, Eastern voluntarily and actively participated in the UMWA Funds for four decades. In fact, Eastern participated in and contributed to the UMWA Funds from their inception in 1946 until Eastern sold its coal operations to Peabody in 1987.

From 1946 to 1965, Eastern was signatory to successive collective bargaining agreements with the UMWA. During that period, it was a member of the Bituminous Coal Operators' Association ("BCOA"), the multiemployer bargaining association that negotiated collective bargaining agreements with the UMWA. Eastern was signatory to the NBCWAs of 1947 and 1950, and the 1951, 1952, 1955, 1956, 1958, and 1964 amendments to the 1950 NBCWA. R 2626. From August 1946 through December 1965, Eastern contributed directly to, and its employees earned service credits toward benefits from, the UMWA multiemployer funds. R 2625-26. Thereafter, from 1966 until 1987, Eastern's wholly-owned subsidiary, EACC, was a member of BCOA and a signatory to the NBCWAs of 1968, 1971, 1974, 1978, 1981, and 1984. During this 22-year period, Eastern and its coal subsidiary were not only under common ownership and control but the top directors and officers of the coal subsidiary simultaneously served as directors and officers of Eastern. R 276, 349, 388.[27]

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[27] Under the Coal Act, Eastern has not been assigned liability for any of its former employees and retirees (or their dependents) who

Eastern's participation in the Funds benefited it in many ways. First, throughout this period, thousands of Eastern's employees and retirees, and their dependents, received comprehensive health and retirement benefits from the UMWA Funds. The Funds were the source of millions of dollars of health benefits provided directly to Eastern's employees, retirees, and their families. Second, as one of the original employers involved in the creation of the UMWA Funds, Eastern benefited from the UMWA's reciprocal agreement to permit employers to mechanize the mines. JA 265; *see also* 138 Cong. Rec. S17,632 (daily ed. Oct. 8, 1992) (statement of Sen. Rockefeller). This greatly increased coal production and employer profits. Third, the employers' collective agreement to participate in the Funds was a necessary element of securing labor peace with the UMWA. As stated by UMWA President John L. Lewis, "I don't know of anything that runs further into the emotions of a human being than the matter of our Welfare Fund, with its security for our people. It is a dream that has come true, long deferred through the centuries." R 942. Fourth, the Funds stabilized employment for Eastern and other participating employers, preventing the loss of skilled mine workers to other industries. R 976. Finally, the Funds benefited Eastern and other participating employers by providing "a major boost in miners' morale and on-the-job attitudes." *Id.*

3. *Eastern's Retirees' Expectations Of Lifetime Health Benefits*

Eastern repeatedly states in its brief that it did not "promise" its UMWA employees continued health benefits after they retire. It parses through contractual language and reservation-of-rights clauses as if those provisions, even if accurately interpreted by Eastern, would somehow limit Congress' authority to legislate. As the court of

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worked for Eastern's coal subsidiary between 1966 and 1987. Those beneficiaries, who numbered approximately 1860 as of October 1, 1993, have been assigned to EACC, now a wholly-owned subsidiary of Peabody. JA 144a.

appeals correctly noted, however, "this is a constitutional challenge, not a breach of contract case." Pet. App. A-13. The relevant inquiry is whether it was rational for Congress to assign Eastern liability for the Combined Fund's beneficiaries who can be traced to Eastern.

In addition to the "pay for your own" principle, which is sufficient in and of itself to demonstrate the rationality of the Coal Act, Congress had before it more than sufficient information to conclude that coal operators such as Eastern collectively contributed to miners' expectations that they would receive health benefits for themselves and their dependents throughout their retirement years.

First, the Coal Commission found that "[r]etired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years." JA 245a-246a. The Coal Commission found, moreover, that the miners' expectation of lifetime health care was no mere reliance on some hoped-for gratuity; rather, it arose directly from the give-and-take of the collective bargaining process. Coal miners expected lifetime health benefits in part "because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits." JA 236a.[28] For example, until the 1998 collective bargaining agreement, the monthly pension for a miner's widow was only $125. *See, e.g.*, R 830.

Second, when Congress held hearings on the Coal Commission report, it heard testimony from Funds beneficiaries, including the following from a representative UMWA retiree: "I went into the mine with the idea that when my time came, I could retire and have [health] benefits, plus a pension."[29] Similarly, a widow of a retired miner

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[28] Pensions for coal miners in the past have been substantially lower than for other industrial workers such as steel and auto workers. JA 295a.

[29] *Coal Commission Report on Health Benefits of Retired Coal Miners, Hearing Before the Subcomm. on Medicare and Long-Term*

testified that she and her family expected health benefits from the Funds because "[t]hat is what they promised him and that is what we planned on and what we believed." [30]

Third, the employer-appointed trustee to the 1950 W&R Fund, Charles A. Owen, informed all signatory coal operators by letter from the National Coal Association, dated November 5, 1951, that the Fund's medical benefits included "Hospitalization, Surgical and Medical Care for mine worker[s], including pensioners, and dependents during his life, without limit as to duration . . . ." R 1971-72.

Fourth, while miners such as Samuel East were providing labor to Eastern, they contemporaneously were accruing service credits to become eligible for a UMWA pension and retiree health benefits. Miners needed 20 years of service, among other things, to qualify for pension and retiree health benefits for themselves and their dependents. R 892-93, 909-10, 973-74. Eastern contributed to their legitimate expectations of retiree health benefits by signing, over a period of 41 years, successive collective bargaining agreements with the UMWA that provided such benefits. R 639, 707, 730, 748, 776-77.

Finally, federal courts consistently have found that, throughout the history of the UMWA Funds, signatory employers such as Eastern created a legitimate expectation that UMWA retirees would receive lifetime health benefits. No court has held to the contrary. *See United Mine Workers of America v. Nobel*, 720 F. Supp. 1169, 1173, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) (noting "25-year history of lifetime benefits prior to 1974"); *Grubbs v. UMWA*, 723 F. Supp. 123, 127 (W.D. Ark. 1989) ("From 1950 to 1974, the benefits

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Care of the Senate Finance Comm., 102d Cong. 5 (1991) (statement of Homer Eckley).

[30] *Id.* at 4 (statement of Dixie Woolum).

available to retired or disabled miners and their families were never decreased or eliminated and beneficiaries were entitled to receive pension and health benefits for life."). *See also District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan & Trust*, 826 F.2d 280, 282 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) ("we agree with the district court's conclusion that the intention of the parties in providing for retirement health benefits was to guarantee their provision for life."); *In Re Chateaugay Corp.*, 945 F.2d 1205, 1210 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1167 (1992) ("the retired employees are guaranteed the provision of health benefits for life under the collective bargaining agreement"). *See* JA 132a-134a.

SUMMARY OF ARGUMENT

The Coal Act does not violate the Due Process Clause. In reaching that conclusion, the court of appeals, like the numerous other federal courts that have sustained the constitutionality of the statute, relied on an unbroken line of decisions from this Court upholding economic legislation in the area of employee benefits. In a series of cases addressing the validity of congressional efforts to apportion liability for medical or pension costs arising out of the employment relationship, the Court long has recognized a presumption of constitutionality that can be rebutted only if it can be shown that Congress has acted arbitrarily or irrationally.

The Coal Act's assignment of liability to Eastern for the future costs of health benefits for some of Eastern's own retirees and their dependents is precisely the kind of economic regulatory measure to which this Court has accorded substantial deference. In the Coal Act, Congress carefully apportioned liability among various groups of employers, including NBCWA signatories like Eastern that are no longer in the coal business. Congress rationally chose to include such former signatories because they voluntarily participated in, and benefited from, the multi-employer system since its inception, profited from the

labor of the miners that have been assigned to them, directly contributed to the UMWA Funds' liabilities by awarding their miners' service credits, and contributed to miners' expectations that they and their dependents would receive medical care throughout retirement. There was nothing arbitrary or irrational about the legislative decision to allocate some retiree health care liability to Eastern.

Nor does the Coal Act violate the Takings Clause. Congress' decision to impose on Eastern the cost of providing health care for those retirees that never worked for a 1978 or later NBCWA signatory and that Eastern employed for longer than any other employer remaining in business is an economic regulatory measure that does not effect a taking within the meaning of the Fifth Amendment. The government has taken nothing for its own use, but has instead sought to provide for the continuation of a privately financed self-sufficient program. Neither fairness nor justice should permit Eastern to avoid all financial responsibility for its coal industry retirees and to have those costs shouldered by the general public or by other coal operators that never employed the retirees in question.

Eastern wrongly attempts to equate the Coal Act's monetary exactions with government action involving the invasion or complete deprivation of the use of land. This Court repeatedly has recognized that legislative enactments similar to the Coal Act are economic regulatory measures that do not constitute takings requiring government compensation. The economic impact of the Coal Act on Eastern is related directly to the number of coal miners who were actually employed by Eastern, who earned service credits through that employment, and who either survive today or are survived by eligible dependents. Further, given the unique history of the UMWA Funds, the pattern of federal involvement, and Eastern's own actions in creating Fund liabilities and creating in miners a legitimate expectation of lifetime benefits, Eastern had no reasonable investment-backed expectation that

it could walk away from its former employees and have someone else pay for their retiree health benefits.

ARGUMENT

I. THE COAL ACT COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

At least 40 federal judges have considered the constitutionality of the Coal Act, and they have concluded unanimously that the statute is valid.[81] This is hardly surprising in view of the long line of cases from this Court that support this result. In attempting to overturn the court of appeals' decision, Eastern misstates the well-settled judicial standard for review of economic legislation, ignores the rationality of the plan chosen by Congress to apportion financial responsibility among various groups of coal operators, and either disregards or distorts the factors that Congress considered in assigning financial responsibility to former signatory employers such as Eastern.

A. The Court Of Appeals Applied The Correct Standard Of Judicial Review

This Court long has recognized Congress' right, with minimal judicial oversight, to address economic problems and to enact legislation to deal with those problems. *See*,

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[81] In the courts of appeals: Judges Selya, Cyr, and Stahl (1st Cir.); Judges Mahoney, McLaughlin, and Heaney (sitting by designation) (2d Cir.); Chief Judge Becker and Judges Mansmann and Brotman (sitting by designation) (3d Cir.); Chief Judge Wilkinson and Judges Widener, Murnaghan, Wilkins, Karen Williams, and Mackenzie (sitting by designation) (4th Cir.); Judges Keith, Brown, Nelson, Suhrheinrich, Siler, and Moore (6th Cir.); and Judges Cudahy, Cummings, and Kanne (7th Cir.). In the district courts: Judge Wolf (D. Mass.); Judge Martin (S.D.N.Y.); Judges Ambrose and Smith (W.D. Pa.); Judge Richard Williams (E.D. Va.); Judge Keeley (N.D. W. Va.); Chief Judge Haden and Judges Faber and Knapp (S.D. W. Va.); Chief Judge Buchmeyer (N.D. Tex.); Judge McKinley (W.D. Ky.); Judge Graham (S.D. Ohio); Judge Hull (E.D. Tenn.); Judge Tinder (S.D. Ind.); and Judges Kessler and Sullivan (D.D.C.).

e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws."); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws because they may be unwise, improvident, or out of harmony with a particular school of thought."). The Court's traditional deference is directly attributable to Congress' unique ability to weigh competing interests and to assess the impact of its legislation. The fact that Congress' enactments "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment." *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84 (1978).

It is well settled that economic legislation such as the Coal Act is entitled to a considerable presumption of constitutionality. As the Court emphasized in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), when reviewing the constitutionality of another statute (the Black Lung Benefits Act) that assigns liability to certain coal operators:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

In determining whether Congress has acted in an arbitrary or irrational way, the Court looks only to determine whether economic legislation is "supported by a legitimate legislative purpose furthered by a rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Economic legislation will be sustained so long as any conceivable rational basis exists for the statute under review, regardless of whether Congress articulated or even considered the rationale. *See FCC v.*

Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature").

In enacting economic legislation, Congress has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985). In addition, the Court has held that Congress' economic legislative choices are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. at 315. Moreover, under the rational basis test, there need not be a tight fit between the statute's purpose and the statutory means to further that purpose. *See, e.g., Heller v. Doe*, 509 U.S. 312, 321 (1993) ("Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 639 (1993) ("under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means.").[32]

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[32] Like the companies that challenged the Black Lung Benefits Act in *Turner Elkhorn* and the MPPAA in *R.A. Gray*, Eastern asks this Court to resuscitate *Railroad Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935), which is the last case in which the Court invalidated an Act of Congress on substantive due process grounds. *See* Pet. Br. at 25-26. This Court's more recent due process decisions make clear that *Alton* no longer "retains vitality." *See, e.g., Turner Elkhorn*, 428 U.S. at 19. Numerous lower courts also have "expressed doubts over the continued validity" of *Alton*. *See, e.g., Chew v. E. R. Quesada*, 182 F. Supp. 231, 232 (D.D.C. 1960) ("The evidence is overwhelming that *Alton* is no longer controlling law"); *LTV Steel Co. v. Shalala*, 53 F.3d 478, 487 (2d Cir. 1995) ("In both letter and spirit, Alton belongs to the long-discredited era of Lochner-style

Despite these repeated holdings and the fact that the Court has not invalidated any economic legislation on substantive due process grounds in more than 60 years, Eastern asserts that the Due Process Clause requires "a tight causal nexus between the harm addressed by the statute and the persons singled out to provide a remedy for that harm." Pet. Br. 35. Eastern's position is simply wrong. Eastern's call for a "tight causal nexus"—or, indeed, any kind of *causal* nexus—is directly contrary to the rational basis test applied by this Court. The radical new standard proposed by Eastern would result in a dramatic encroachment on legislative authority and would require, for every piece of economic regulatory legislation, a showing that every person asked to help solve a problem was a direct part of the problem's cause. The Due Process Clause imposes no such requirement.

In a further effort to circumvent this Court's due process rulings, Eastern asserts that the Coal Act is "retroactive" economic legislation and that it therefore is subject to heightened judicial scrutiny. Pet. Br. 22-26. Eastern's factual premise is misleading, and its call for a different standard of review is squarely contradicted by prior holdings of this Court.

The Coal Act required Eastern and other assigned operators to pay for their retirees' *future* health benefits, beginning on February 1, 1993. It expressly left unchanged, for the duration of the existing collective bargaining agreement (the 1988 NBCWA), the contractual regime for funding retiree health care in the coal industry. *See* 26 U.S.C. § 9708. The Coal Act made no provision for any health care prior to the statute's enactment date or, indeed, at any time prior to the termination of the 1988 NBCWA on February 1, 1993. As the Court re-

judicial activism") (citing cases). *See also* David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 87 Cath. U. L. Rev. 1, 12 (1987) (*Alton* belongs to the same period of "judicial arrogance" as *Lochner*). Moreover, *Alton* is readily distinguishable from this case, as the Second Circuit explained thoroughly in *LTV*. 53 F.3d at 488-89.

cently explained, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

Nonetheless, Eastern maintains that the Coal Act is "retroactive" because it requires Eastern to pay for future health benefits for miners who retired before the effective date of the Act. Even if such future payments properly could be characterized as a retrospective liability, the Coal Act remains subject to a rational basis standard of review. That is what this Court held in *Turner Elkhorn*. 428 U.S. at 16-20. Eastern's reliance on that decision is misplaced.

In *Turner Elkhorn*, the Court considered whether the Black Lung Benefits Act violated the Due Process Clause by requiring coal operators to pay benefits of former employees who left employment in the industry before the effective date of the Act. Applying a rational basis test, the Court concluded:

> We find, however, that the imposition of liability for the effects of disabilities bred in the past *is justified as a rational measure* to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.

428 U.S. at 18 (emphasis added).

In addition, as the Court clearly explained in its unanimous opinion in *R.A. Gray*, 467 U.S. at 729, Congress has wide latitude to regulate in the economic sphere, and even "retroactive" economic legislation is subject to the rational basis test:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wis-

dom of such legislation remain within the exclusive province of the legislative and executive branches.

B. The Coal Act Is The Product Of Rational Legislative Choices

Eastern does not challenge the legitimacy of the congressional purpose to resolve problems associated with the funding of health care for beneficiaries of the UMWA multiemployer plans. Eastern confines its attack to the means that Congress selected to accomplish this purpose. Contrary to Eastern's submission, those means are plainly rational.

With the benefit of the Coal Commission's report, and having considered various legislative proposals (and lobbying by every affected group) over the course of three years, Congress carefully crafted the Coal Act to apportion costs among various groups of employers and to mitigate the financial impact on those employers. For example, Congress placed a cap on the annual per beneficiary health premium for the Combined Fund, and it left open the possibility that benefit levels might need to be adjusted in the future if the Combined Fund's costs outstrip the annual Consumer Price Index adjustment of the per beneficiary premium. *See* 26 U.S.C. §§ 9703(b)(1), 9704(b)(2). To lessen the burden on employers in providing benefits for "orphan" retirees whose former employers are no longer in business, Congress provided for three annual transfers of $70 million each from the 1950 Pension Plan during the Combined Fund's first three years, and additional annual transfers in later years from the Abandoned Mine Reclamation Fund, in amounts of up to $70 million per year. 26 U.S.C. § 9705(b), 30 U.S.C. § 1232(h).

In formulating the financing rules for the Coal Act, Congress placed heaviest responsibility on those coal operators that signed the 1988 NBCWA, which was the collective bargaining agreement in effect when the statute was enacted. The 1988 NBCWA signatories were responsible for the start-up costs of the Combined Fund. 26 U.S.C. § 9704(i). Congress also required the 1988 signatories to continue their existing individual employer plans ("IEPs") for UMWA beneficiaries, to guarantee benefits for any beneficiaries of the 1992 Plan who are "orphaned" by their former employers, and to secure a proportionate share of the projected future cost of providing health benefits to the beneficiaries in the employers' IEPs and in the 1992 Plan. 26 U.S.C. § 9711, § 9712(d). Companies such as Eastern were exempted from these 1992 Plan requirements, and they also have no IEP obligation under Section 9711.

Congress apportioned the next greatest amount of responsibility to 1978 or later NBCWA signatories, by placing them first in the hierarchy of assignment priorities for Combined Fund beneficiaries.[83] *See* 26 U.S.C. § 9706(a). Thus, if a beneficiary worked, even briefly, for a coal industry employer that signed a 1978 or later NBCWA and was still "in business," the beneficiary would be assigned to the 1978 or later NBCWA signatory employer, even if he worked for a much longer period for an employer such as Eastern that only signed earlier NBCWAs.[84] Congress also excluded non-union and west-

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[83] Post-1978 signatories rationally could have been assigned greater responsibility than pre-1978 signatories for several reasons: (a) they employed the retirees more recently in the coal business; (b) they signed the contractual "guarantee clause" that guaranteed benefits from the 1950 and 1974 Benefit Trusts during the term of the agreements in which the clause appeared; and (c) they agreed, pursuant to the "evergreen clause" incorporated into the NBCWAs, to continue contributing to the UMWA Funds for as long as successor NBCWAs required such contributions. *See generally* JA 300a-303a.

[84] This provision has substantially reduced Eastern's liability under the Coal Act. For example, none of the 4,000 employees who transferred from Eastern to EACC in 1965 have been assigned to Eastern because all of those employees, by definition, worked for a post-1978 signatory that is still in business—EACC. In other words, even though Eastern made substantial profits from the labor of its EACC employees between 1965 and 1987 (*i.e.*, more than $100 million

efn coal companies that had not participated in the UMWA Funds. *See* 138 Cong. Rec. S17,603 (discussing decision not to include "western State coal companies which had no involvement in the UMWA-BCOA agreement") (remarks of Senator Wallop).

C. The Coal Act's Financing Plan Is Rational As Applied To Former Signatory Employers Such As Eastern

The history of the UMWA Funds and the financial crisis that led to the passage of the Coal Act demonstrates that Congress acted rationally in apportioning employer funding responsibility under the statute to both current and former signatory employers, including pre-1978 signatories. It was rational for Congress to include both current and former signatories for several reasons, including: (1) both current and former signatories had thousands of former employees receiving comprehensive benefits from the UMWA Funds at the time the statute was enacted, (2) both current and former signatories had employed the retired miners and profited from their labor, (3) both current and former signatories directly contributed to the Funds' liabilities by awarding the miners service credits, which resulted in their becoming eligible for pensions and retiree health benefits, and (4) both current and former signatories contributed to the miners' expectations that they would receive lifetime medical care for themselves and their dependents.[35]

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in dividends), Eastern has not been assigned liability for any of those employees who are now receiving benefits from the Combined Fund. All of that liability has been assigned to EACC, now a wholly-owned subsidiary of Peabody, or to some other post-1978 signatory.

[35] Congress' decision to include in the Coal Act not only employers that were participating in the UMWA Funds at the time of the statute's enactment but also employers that participated in the past and still had former employees or their dependents in the UMWA Funds as of the date of the statute is hardly the "unprecedented" measure that Eastern makes it out to be. Under the Comprehensive Environmental Response, Liability, and Compensation Act ("CERCLA"), for example, any release of a hazardous waste, no matter how small and no matter when it occurred in the past, can result in joint and several liability for the entire cost of cleaning up the site where the release occurred. *See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (retroactive effect of CERCLA upheld).

This Court's decisions support the rationality of the legislative choice. *See, e.g., Turner Elkhorn*, 428 U.S. at 18 (it is rational for Congress "to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor"); *Concrete Pipe*, 508 U.S. at 638 (rational basis exists to assign responsibility to employer that "has contributed to the plan's probable liability by providing employees with service credits.").

In addition, it was rational for Congress to conclude that both current and former signatory employers, by voluntarily signing successive NBCWAs that provided for comprehensive health care for more than 40 years, collectively contributed to miners' expectations that once they retired, they would receive lifetime health benefits for themselves and their dependents. As the court of appeals correctly observed, whether Eastern or other signatory employers made a binding contractual promise of lifetime benefits is irrelevant. Congress' ability to enact remedial legislation cannot be eclipsed by, or restricted to, private contractual terms or disclaimers. *See Connolly*, 475 U.S. at 223-24 ("contracts, however express, cannot fetter the constitutional authority of Congress").

Eastern's assertion that the Coal Act shifts to former signatories part of an obligation voluntarily assumed by current coal operators (Pet. Br. 34-35) is erroneous and reflects a fundamental misunderstanding of the problem that Congress confronted in the Coal Act. As Eastern itself concedes elsewhere in its brief (Pet. Br. 9), *every* NBCWA since 1946, including not only the agreements signed by Eastern but also the more recent agreements through and including the 1988 NBCWA, imposed contribution requirements that applied "[d]uring the life of this Agreement . . . ." *See, e.g.*, R 819. When Congress

acted in 1992, therefore, it was concerned not with the brief remaining term of the 1988 NBCWA but with what was going to occur after the five-year term of that agreement came to end on February 1, 1993. At that point, the argument that Eastern makes now would have been equally available to the 1988 signatories, *i.e.*, they too could have contended that they had fulfilled their contractual contribution requirements and that they had no further obligation to participate in funding health care for the beneficiaries of the UMWA Funds. *See, e.g.*, JA 322a-323a (statement of Vice Chairman Henry H. Perritt). The Coal Act, in short, was designed not to shift any contractual obligation already undertaken but to provide a rational allocation of the financial burden of providing health care during future periods not yet covered by any collective bargaining agreement.

II. EASTERN'S COAL ACT LIABILITY IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY

The Coal Act is a rational economic regulatory measure that falls well within Congress' legislative power. Like other such measures that have been sustained by this Court, the statute does not effect a taking that triggers the "just compensation" requirement of the Fifth Amendment. The Coal Act readjusts economic burdens to preserve a privately-financed multiemployer health benefit fund for thousands of coal industry retirees and their dependents. By its claim under the Takings Clause, Eastern is attempting to avoid all financial responsibility for its coal industry retirees and to foist those financial obligations either on other signatory operators or on the general public.[36] The Takings Clause does not require any such result.

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[36] Eastern itself says that, if its position were accepted, other coal operators would be required to pay for the health care of Eastern's retirees. Pet. Br. 18 n.36. By contrast, Pittston, whose own efforts to dump its retiree health care costs onto other employers played such a central role in the genesis of the Coal Act, now has the temerity to argue that, if Eastern were to prevail in its attack on the Coal Act, then the entire statute would need to be stricken, because otherwise employers like Pittston might have to contribute toward the health care costs of persons whom they never employed, namely, Eastern's retirees. *See* Pittston Amicus Br. 2-3, 6-7.

Although this Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment" and has instead engaged in an ad hoc factual inquiry into the "circumstances of each particular case," *Connolly*, 475 U.S. at 224, the Court consistently has looked to three factors that it has found to be of "particular significance" in evaluating Takings Clause claims. *Id.* at 225; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). These factors are (1) the character of the government's action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with the claimant's distinct and reasonable investment-backed expectations. *Id.* at 124-25. *See also Connolly*, 475 U.S. at 224-25; *Concrete Pipe*, 508 U.S. at 643-44. As the court of appeals correctly held (Pet. App. A-19 to A-23), each of these factors militates in favor of the validity of the Coal Act as applied to Eastern.

A. The Coal Act Is Valid Economic Regulation That Adjusts The Benefits And Burdens Of Economic Life

The Court has accorded Congress substantial leeway under both the Due Process and the Takings Clauses in devising financing mechanisms for economic regulatory programs. Indeed, the Court has stated, that when economic regulation has survived a due process challenge, it "would be surprising indeed to discover" that the statute effects an uncompensated taking. *Connolly*, 475 U.S. at 223. The Court made this statement in the course of unanimously sustaining the MPPAA against a Takings Clause challenge, after the Court already had upheld the same statute against a due process attack in *R. A. Gray*, 467 U.S. at 734. *See also Concrete Pipe*, 508 U.S. at 641.

The Coal Act reflects a reasoned congressional judgment that the financial responsibility for preserving the UMWA multiemployer health benefit plans should be borne by the current and former unionized coal employers that voluntarily participated in and benefited from the plans over the years. After considering other alternatives, Congress rationally concluded that the responsibility should not rest with a narrower group of employers or with the entire coal industry or the general public. Congress sought "to facilitate a private party solution, not create a new federal entitlement program or establish a precedent for other federal action." 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992). As Congress said in the statute itself, the Coal Act is intended "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans" and "to identify persons most responsible for plan liabilities in order to stabilize plan funding . . . ." Combined Fund App. 1a.

The Coal Act is thus precisely the kind of economic regulation that the Court has been reluctant to characterize as a taking. As in *Connolly*, the government "has taken nothing for its own use," 475 U.S. at 224, nor has it otherwise "acted for its own advantage." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). *Connolly* recognized that the pension plan withdrawal liability imposed by the MPPAA "permanently deprived [a covered employer] of those assets necessary to satisfy its statutory obligation," 475 U.S. at 222, but the Court nevertheless concluded that Congress enjoys wide latitude to regulate in the economic realm (*id.* at 223):

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

The Court in *Connolly* deferred to the judgment of Congress in determining the appropriate statutory scheme to protect the solvency of private multiemployer pension plans. The Court therefore sustained the legislative determination that the responsibility for rescuing privately-financed pension plans should rest with the employers that voluntarily participated in those plans, and not with the general public:

> We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. . . . We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

475 U.S. at 227-28.

Like the MPPAA, the Coal Act imposes financial liability on employer participants in multiemployer benefit plans, so as to safeguard and ensure the financial well-being of those plans. That is the character of the governmental action. Any "interference with [Eastern's] property rights . . . arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under [the Court's] cases, does not constitute a taking requiring Government compensation." *Connolly*, 475 U.S. at 225.

Eastern attempts to treat the Coal Act as if it were a physical invasion of real property or a form of land-use regulation. This Court has rejected such efforts to equate economic regulatory measures with deprivations of the use of land. In *Concrete Pipe*, for example, the Court stated:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

508 U.S. at 643. Likewise, in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court elaborated on the difference between government assessments of monetary liability and physical occupation of, or other intrusions on, real property:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding a per se taking where landlords were required to allow television cable companies to place cable facilities in apartment buildings)].

Id. at 62 n.[37]

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which involved a constitutional challenge to a state land-use regulation, the Court stressed the distinction between such a measure and mere economic regulation of personal property. In the Court's words, "in the case of personal property, by reason of the State's high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically

[37] *See also Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996) (rejecting a Takings Clause challenge to the provisions in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that imposed on banks owned by a single holding company liability for the debts of any failed banks within the group; "the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability."); *Meriden Trust & Safe Deposit Co. v. Federal Deposit Ins. Corp.*, 62 F.3d 449, 455 n.2 (2d Cir. 1995) (same); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

productive use is sale or manufacture for sale)." *Id.* at 1027-28. Eastern's extended reliance on *Lucas* and on other land-use cases such as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is thus misplaced in this case.

Nor is Eastern helped by *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which Eastern cites throughout its brief. In *Webb's*, the Florida legislature mandated that the interest that accrued on an interpleader fund held by a state court "shall be deemed income of the office of the clerk of the circuit court." The legislature imposed this rule even though it had directed separately that the clerk take a percentage fee on the very same account "for services rendered." *Id.* at 156 n.1, 157. The legislature offered no justification for its declaration that the accrued interest should be deemed income of the office of the clerk. *Id.* at 163. This Court held that in the absence of "any reasonable basis to sustain the taking of the interest earned by the interpleader fund," the interest was "a forced contribution to general governmental revenues, [which was] not reasonably related to the costs of using the courts." *Id.* The governmental action in *Webb's* is not even remotely similar to the governmental action in the Coal Act.

B. The Economic Impact Of The Coal Act Is Reasonably Related To Eastern's Experience Under The UMWA Funds

As recognized by the court of appeals, the economic impact of the Coal Act is reasonably related to Eastern's experience with the Funds. Significantly, Eastern's assignment of responsibility is tailored to the number of Eastern's retirees, and their dependents, who currently are receiving benefits from the Combined Fund. The number of Eastern retirees currently receiving benefits from the Fund is related to the length of time Eastern participated in the Fund, the size of Eastern as a major coal industry employer with a large number of employees, and the last

date on which Eastern was signatory to a collective bargaining agreement with the UMWA. Because Eastern's liability under the Coal Act "directly depends on the relationship between the employer and the plan to which it had made contributions," the economic impact of the regulation does not support Eastern's takings claim. *Connolly*, 475 U.S. at 225.

Eastern repeatedly states in its brief that it has estimated its total undiscounted Coal Act liability to be "more than $100 million." Pet. Br. at 2. This is almost certainly an overestimation. Indeed, in its official filing with the Securities and Exchange Commission, Eastern has estimated its total undiscounted Coal Act liability to be $80 million before taxes. *See* Eastern's Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ending December 31, 1996 (Comm. File No. 1-2297) at Form 10-K/28. After taxes, Eastern has estimated its own undiscounted liability to be $51 million. *Id.* In any event, as Eastern concedes, the precise amount of Eastern's liability is not dispositive. *See Concrete Pipe*, 508 U.S. at 645 ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").[38]

Moreover, the Court in *Connolly* ruled that assessing withdrawal liability on an employer leaving a multiemployer pension plan did not constitute a taking where the statute contained provisions "that moderate and mitigate the economic impact of an individual employer's liability." *Connolly*, 475 U.S. at 225-26. That is precisely

[38] This Court has held, for example, that a 92.5% diminution in the value of property is permissible under the Takings Clause. *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915). *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75% diminution in value not impermissible under the Takings Clause); *Concrete Pipe*, 508 U.S. at 645 (alleged 46% diminution in value not impermissible). In any event, Eastern has made no allegation that the amount of its Coal Act liability is disproportionate to its total assets.

the situation under the Coal Act. First, the assignment process set forth in 26 U.S.C. § 9706(a) creates a hierarchy in which companies like Eastern are assigned only beneficiaries who never worked for a 1978 or later NBCWA signatory. Eastern itself has benefited from this assignment scheme. Many beneficiaries who worked for Eastern, perhaps for many years, have been assigned to other employers that were 1978 or later NBCWA signatories. Other provisions in the Coal Act that mitigate employers' liabilities are provisions providing for three annual transfers of $70 million each (a total of $210 million) from the UMWA 1950 Pension Trust, and transfers from the Abandoned Mine Reclamation Fund (more than $110 million to date), to cover orphan beneficiaries. To date, these transfers have completely covered the cost of the "orphan" beneficiaries, as Eastern admits.[39]

C. Eastern Had No Distinct And Reasonable Investment-Backed Expectation That It Could Escape Responsibility For Its Former Employees In The UMWA Funds

Eastern attempts to wash its hands of all responsibility for its former coal miners and their families. Eastern contends that the Coal Act has interfered with its distinct and reasonable investment-backed expectations because it "confined [its] operational liabilities" to its subsidiary EACC in 1965, and then sold all of EACC's stock to Peabody in 1987. Eastern's argument is without merit for several reasons.

First, in *Connolly*, the Court rejected arguments from employers asserting that they had no reasonable expectations that they would be required to pay withdrawal lia-

[39] Further, in creating the Combined Fund, Congress closed the beneficiary pool, ensuring that the liability of Eastern and other signatory operators would decrease over time, as the natural result of the mortality of an aged beneficiary population. Indeed, approximately a third of the Combined Fund beneficiaries assigned to Eastern have died since the Combined Fund began providing benefits on February 1, 1993.

bility to multiemployer pension plans. The Court explained, among other things, that pension plans "were the objects of legislative concern long before the passage of ERISA in 1974." 475 U.S. at 226. Eastern's argument is even more untenable than the petitioners' in *Connolly*, because the government helped to create the UMWA Funds that are the subject of the Coal Act, and has periodically intervened in various ways to assist and protect the Funds and thus to ensure the continuation of their health care coverage.

Eastern and similarly situated employers knew from the very beginning of their participation in the multiemployer health plans that the government could step in to regulate the plans' administration and funding. Indeed, employer anticipation of the possibility of future government regulation of UMWA health benefits was publicly expressed as early as 1953, when Joseph Moody, the President of the Southern Coal Operators' Association, acknowledged that beneficiaries had been "promised" and had "grown accustomed to" receiving benefits from the 1950 W&R Fund, and he predicted that "[i]t is entirely conceivable that Congress, with an eye to the danger of complete disruption of the domestic coal industry—and to the votes involved—might decide it was necessary to step in and take over the mines, assuming responsibility for the welfare collection and payment." R 2000.

Congress did later intervene to assist the Funds and employers like Eastern in a variety of ways. As noted previously, Congress provided money to help the Funds sell the hospitals they had built. Congress amended the tax code to grant tax relief to contributing operators in 1954, and then again in 1974. In the 1960s and 1970s, Congress passed legislation obligating employers to devote substantial resources to mine safety and to the treatment of related health issues, such as Black Lung. *See generally* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801 *et seq.*

As the court of appeals observed, Eastern's attempt to "feign astonishment" regarding its obligations under the

Coal Act should not be credited. The unique history of the UMWA Funds, the pattern of federal involvement, and the fact that Eastern contributed to the beneficiaries' expectation of lifetime health benefits all undermine Eastern's protestations. "Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Pet. App. A-22.

Eastern asserts that, if miners developed an expectation of lifetime benefits, "it cannot be traced to Eastern." Pet. Br. 42. That is not correct. As noted above, the expectation of lifetime benefits was created in the 1940s and 1950s when the Funds were created. The employers' negotiation of successive labor agreements perpetuating the Funds furthered that expectation. *See, e.g., UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991) ("25-year history of lifetime benefits prior to 1974"). *See also* pp. 28-29, *supra*.

Eastern's role in creating an expectation of lifetime health benefits can be traced to post-1965 events as well. Specifically, EACC was a wholly-owned subsidiary of Eastern from 1965 to 1987. Eastern's top corporate executives simultaneously served on the Board of Directors of both Eastern and EACC. During this time that Eastern and EACC were under common control, EACC was signatory to the NBCWAs of 1974, 1978, 1981, and 1984. Each of those Agreements expressly stated that beneficiaries of the UMWA multiemployer benefit plans (the 1950 Benefit Trust and the 1974 Benefit Trust), including retired and disabled miners and their eligible dependents, would be entitled to retain their Health Services card "for life," or "until death," or, in the case of a widow, "until her death or remarriage." *See, e.g.*, R 755-58 (1974 NBCWA); R 788-92 (1978 NBCWA). Since Eastern owned and controlled EACC at the time that EACC became signatory to agreements containing this language, Eastern can hardly claim surprise that Congress linked

Eastern, as well as EACC, to the retirees' expectation of lifetime benefits.

The passage of MPPAA in 1980 provided Eastern with further notice that federal regulation might be forthcoming to prevent it from walking away from the UMWA health benefit funds without any liability. In MPPAA, Congress created withdrawal liability for employers that withdraw from multiemployer pension plans. The liability extends not only to signatory employers, but also to their corporate parents and others within the corporate "control group" as defined by the statute. *See* 29 U.S.C. § 1301(b)(1). Under this provision, Eastern would have been liable if its subsidiary, EACC, had withdrawn from the UMWA multiemployer pension plans. Eastern was exposed to this liability from 1980, when MPPAA was passed, until 1987, when it sold EACC to Peabody.

Therefore, as recently as five years prior to the passage of the Coal Act, Eastern was, or should have been, aware of a federal regulation that exposed it to substantial liability associated with the UMWA multiemployer Funds, even though Eastern had transferred its coal operations to EACC in 1965. Under MPPAA, Congress looked beyond intra-corporate relationships to assign liability to the entire corporate family. Given the unique history of the UMWA multiemployer health care system, the pattern of federal government involvement, Eastern's voluntary participation in the Funds for more than 40 years, and Eastern's actions in contributing to miners' expectations of lifetime health benefits, Eastern could not have entertained any "distinct" and "reasonable" investment-backed expectation that it would never be called upon to contribute to the funding of its retirees' health care.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN R. MOONEY
PAUL A. GREEN
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005
(202) 783-0010

DAVID W. ALLEN
Office of the General Counsel
UMWA Health and Retirement Funds
4455 Connecticut Ave., N.W.
Washington, D.C. 20008
(202) 895-3737

PETER BUSCEMI
(Counsel of Record)
STANLEY F. LECHNER
DAVID LUBITZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036-5869
(202) 467-7190
Counsel for Respondents The UMWA Combined Benefit Fund and Its Trustees

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RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust and that it has no parent company or non-wholly owned subsidiary. Petitioner has, however, signed a merger agreement with Essex County Gas Co. ("Essex") and Eastern expects, subject to regulatory and Essex shareholder approval, that Essex will be merged into one of Eastern's wholly owned subsidiaries in mid-1998.

I. THE COAL ACT IS AN EXTRAORDINARY EXERCISE OF LEGISLATIVE POWER.

The Coal Act trespasses to an unprecedented degree upon principles of fair notice, finality, and repose. The Coal Act requires Eastern to respond to a crisis that Eastern did not create, to finance promises Eastern never made, and to do so nearly thirty years after Eastern last employed a coal miner. The Government nonetheless suggests that this Court should approach the Coal Act as a routine legislative adjustment of economic burdens.[1] This treatment of the Coal Act fails to engage the critical features that make the statute an unprecedented and unconstitutional exercise of legislative power.

Unlike typical economic legislation, the Coal Act as applied to Eastern does not regulate ongoing economic activity. Rather, the Coal Act extends a regulatory scheme applicable to current coal operators to companies that have not been involved in the industry or the UMWA benefit plans for decades, and therefore are not engaging in conduct that may be subject to present regulation. This feature of the Coal Act distinguishes it from the regulatory schemes that have generated the precedents relied upon by the Government. In particular, the Coal Act is not like the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), addressed in *Gray*, *Connolly*, and *Concrete Pipe*, that regulated current or future withdrawals from multiemployer pension plans that Congress determined would be harmful to the ongoing stability of such plans. Nor is the Coal Act like the statute reviewed in *Turner Elkhorn*, that required current coal operators to compensate employees for injuries sustained in the course of employment in the coal

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[1] Eastern responds principally to the arguments presented by the Federal Respondent. These arguments are similar, in most respects, to those advanced by the other Respondents. Where specifically noted, Eastern responds to separate contentions by the Combined Fund and Peabody.

mines. These prior cases evince the latitude afforded to Congress to allocate current economic burdens in the course of regulating ongoing commercial affairs, and to remedy concrete harms caused by past conduct. They do not, however, establish that the Coal Act must be reviewed under a standard of complete deference.

The features of the Coal Act treated as routine by the Government have not been presented in any prior case. There is no dispute that the Coal Act reaches back over an unprecedented span of years to impose new liability with respect to employment transactions that terminated between 1946 and 1965—more than a generation ago. While it is true that Eastern owned a subsidiary until 1987 that continued to mine coal, the "reachback" liability imposed on Eastern arises *solely* from its own employment of miners in years prior to 1966. Nor does the Government contest that the Coal Act was enacted to address a problem of financial instability that arose in the 1980s, or that the benefits offered by the plans had increased dramatically since Eastern last participated in 1965. Finally, there is no sustainable contention that at the time Eastern made its limited contributions to the UMWA benefit plans between 1946 and 1965, any statute or regulation suggested the type of liability imposed in this case. Under these circumstances, any relationship between Eastern and its former employees is so attenuated and insubstantial that the Coal Act goes far beyond requiring Eastern to simply "pay for its own."

The Court has never sanctioned such an utter disregard of the interests of fair notice, finality, and repose. Nor has the Court ever permitted private parties to be so starkly singled out to solve a social problem—the inadequacy of the funding of the UMWA plans in the early 1990s—that they did not create. To the contrary, the Court has repeatedly recognized that even the broadest congressional powers are not unlimited. *See, e.g., City of Boerne v. Flores*, 117 S. Ct. 2157,

2162-64 (1997); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995). The Court could not uphold the constitutionality of the Coal Act without going well beyond its prior precedents, and without leaving Congress with essentially unlimited power to retroactively single out entities for unforeseen liabilities to remedy harms that they never caused.

II. THE COAL ACT AS APPLIED TO EASTERN VIOLATES THE DUE PROCESS CLAUSE.

The Court has recognized that an adequate justification for prospective legislation "may not suffice" for retroactive legislation such as the Coal Act. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). The Government nonetheless insists that the Coal Act should be accorded essentially complete deference, and that virtually any policy justification is sufficient—regardless of its lack of connection to Eastern. As set forth below, the Government's arguments fail to comprehend the basic values that are offended by the Coal Act's extreme retroactivity and its application to Eastern.[2] Further, the Government's position ignores the warning of *Turner Elkhorn* that retroactive liability "unrelated to [the person's] conduct" may violate due process. 428 U.S. at 24. Indeed, properly understood, each of the

[2] The Government incorrectly suggests that, in making an "as applied" challenge, Eastern is seeking an exception to an otherwise reasonable legislative classification. Fed. Br. at 36-37. Unlike *Weinberger v. Salfi*, 422 U.S. 749, 778-779 (1975), upon which the Government relies, this case does not involve a prophylactic measure designed to prevent an "abuse which [Congress] . . . desired to avoid," and thus, does not involve determinations of economic or social policy as to which reasonable minds may differ (such as the age at which a minor should be eligible for a driver's license). Here, Congress has imposed a liability based entirely on past conduct. In such situations, the necessary inquiry is purely historical and ascertainable, and the Court has considered whether individuals or groups, on the facts presented, can rationally be included within the scope of a statute. *See* Eastern Br. at 25 n.41; *cf. Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 636-41 (1993); *id.* at 649 (O'Connor, J., concurring); *Turner Elkhorn*, 428 U.S. at 26 (noting that the outcome of petitioners' due process challenge might have been different on other facts).

Government's proposed justifications for the application of the statute to Eastern is essentially a surrogate for limitless congressional power to enact retroactive legislation.

A. The Retroactive Imposition of New Liability Raises Serious Due Process Concerns.

Whether the retroactive effect of a statute is so harsh and oppressive as to transgress constitutional limitations depends on several considerations.[3] Most important is the character and extent of the retroactivity, and in particular whether it "gives a different and more oppressive legal effect to conduct undertaken before the enactment of the statute." *United States v. Hemme*, 476 U.S. 558, 569 (1986).

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law.

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (citations omitted); LON L. FULLER, THE MORALITY OF LAW 53 (1964) ("[A] retroactive

[3] Eastern's constitutional claim cannot be dismissed pejoratively as an application of "substantive due process," as Respondents and their *Amici* repeatedly attempt. In fact, the primary concern presented by retroactive legislation is essentially procedural—the lack of notice to citizens and their accompanying inability to know the consequences of their actions at the time they act. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("The Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation . . . ."). In any event, as Justice Souter recently explained, the Court is often called upon to review the reasonableness of a "legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2281 (1997) (Souter, J., concurring).

law is truly a monstrosity.").[4]

Of course, not every retroactive law is unconstitutional. There are some circumstances when retroactive laws are necessary to the functioning of our legal system. *Landgraf*, 511 U.S. at 267-68. There are, however, different degrees of retroactivity. It is one thing to regulate present or future pension plan withdrawals, as in the MPPAA cases. It is quite another to impose a new liability—arising entirely from past participation in a benefit plan—on a company no longer in the business. The difference is substantial, and has been referred to occasionally as the difference between secondary and primary retroactivity. *See Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-220 (1988) (Scalia, J., concurring). Primary retroactivity, which is exemplified by the Coal Act, presents a far more significant threat to our traditions of fair notice, finality and repose.

In addition, the period of retroactivity is significant because, once a transaction is completed, the parties' interest in finality and repose increases with the passage of time. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Reg.*, 496 U.S. 18, 40 n.23 (1990). For example, in upholding the retroactive correction of a "mistake" made by an immediately preceding Congress in revising the estate tax laws, the Court emphasized that "Congress acted promptly and established only a modest period of retroactivity." *United States v. Carlton*, 512 U.S. 26, 34 (1994); *see also Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 731 (1984). As applied to Eastern, the Coal Act attaches an entirely new liability, without notice, to employment relationships completed more than thirty years

[4] Thus, in almost every society, retroactive laws have been considered suspect. *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 328-330 (1996); BENTHAM'S THEORY OF LEGISLATION 146-47 (C. Atkinson ed. & trans. 1914); FULLER, *supra*, at 80.

ago.

Given the nature and extent of its retroactivity, the Coal Act squarely implicates "the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266, 271 (noting that in "contractual or property rights . . . predictability and stability are of prime importance").

B. There Is No Rational Basis for the Liability Imposed on Eastern.

The Government does not contend that Eastern made any express promises of lifetime health benefits, or that Eastern caused the funding crisis that prompted the Coal Act.[5] Instead, the Government offers a series of justifications for the Coal Act that purport to connect Eastern with the "expectation" that a "tradition" of benefits would continue indefinitely, and to establish that Eastern received certain benefits from its participation in the coal industry. Fed Br. at 30-31, 33. These arguments go far beyond anything this Court

[5] While conceding that Eastern made no express promises, the Government makes passing reference to Senator Rockefeller's assertion that health care benefits were "implicitly promised" in 1950 in exchange for the UMWA's acquiescence in the mechanization of the mines. Fed. Br. at 21, 31; *see also* Combined Fund Br. at 26; Peabody Br. at 7, 27-30. This alleged "exchange" is contradicted universally by historians. *E.g.*, MAIER B. FOX, UNITED WE STAND: THE UMWA 1890-1990, at ch. XVI (1990); KEITH DIX, WHAT'S A COAL MINER TO DO? THE MECHANIZATION OF COAL MINING chs. 6-7 (1988); MORTON S. BARATZ, THE UNION AND THE COAL INDUSTRY 71-74 (1955). It is also inconsistent with representations made by the UMWA and BCOA to this Court in prior cases: *See* Br. for Pet. UMWA at 7-9, 12, 59; Tr. of Oral Arg. 2-3; Br. Amicus Curiae for BCOA at 11; *UMWA v. Pennington*, 381 U.S. 657 (1965) (No. 64-48). *See also* Br. for Resp. UMWA at 3, 7, 13, 29, *Pennington v. UMWA*, 393 U.S. 983 (1968) (No. 68-558). The genesis of this fictional agreement appears to be presentations by the UMWA and BCOA, the principal beneficiaries of the statute, to the Coal Commission, JA 259a n.1, 265a, and to Congress, *Coal Comm'n Report on the Health Benefits of Retired Coal Miners, Hr'g before the Subcomm. on Medicare and Long-term Care of the Senate Comm. on Finance*, 102d Cong. 40, 49, 279, 297 (1991). No source material has ever been cited.

approved in *Turner Elkhorn* and, if accepted, would leave Congress with essentially unlimited power to enact retroactive legislation.

1. Mere "Expectations" Cannot Support Eastern's Liability.

As its principal justification for application of the Coal Act to Eastern, the Government contends that Congress could have concluded that Eastern contributed to a reasonable expectation that lifetime health benefits would always be available to miners and their dependents. Fed. Br. at 29-30.[6] While recognizing that Eastern's obligations to its former employees were limited to the payment of defined contributions to the UMWA plan, the Government invokes the principle that Congress is not bound by the "express terms of pre-existing private contracts" in the sphere of economic regulation. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986). The Government also asserts that, irrespective of the limited nature of Eastern's prior agreements, Eastern was part of a "tradition" of continued provision of health benefits by the coal operators through the years. Fed. Br. at 30-31, 33; *but see* note 19 *supra*.

As a matter of common sense (and sound policy), the reasonable expectations of the parties to a fully executed agreement cannot be determined independently of the terms of the agreement. *See Connolly*, 475 U.S. at 235 (O'Connor, J., concurring) (noting that expectations of employee benefits

[6] The Government refers to various findings or "conclusions" of Congress, and asserts that they are insulated from review by the Court. *See, e.g.*, Fed. Br. at 21-22, 32-33. These "conclusions" are simply statements by several individual Senators that exemplify the risks of retroactive legislation by "characteriz[ing] past conduct of private citizens." *Landgraf*, 114 S. Ct. at 1498 n.20 (*quoting Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-514 (1989)). As such, they are not findings of Congress, and in any event do not fall within the "policy making" expertise of Congress to which deference is due. *Id.* In fact, Congress made only one legislative finding, namely that "it is necessary to . . . identify [the] persons most responsible for plan liabilities." Pub. L. No. 102-486, §19142(a)(2), 106 Stat. 3037 (1992).

in the face of contrary plan language are not "easily traceable to the employer's conduct"). Any contrary rule would cede to Congress a virtually unrestricted legislative power to enact retroactive legislation to meet so-called reasonable expectations derived from fictional promises, unsupported (and indeed contradicted) by the parties' express agreement.

Therefore, even if Congress had made a finding that miners had a "reasonable expectation" of lifetime health benefits, such a conclusion could not have rested on the conduct of companies like Eastern.[7] Eastern never undertook to provide retiree health benefits, but merely to make specified contributions through 1965 to the UMWA plans to be distributed at the discretion of the trustees. The issue then becomes whether due process permits the imposition of retroactive liability for greatly expanded retiree health benefits merely because Eastern was *present* when the trustees first provided health benefits to anyone. Surely, however, it must be arbitrary to rest liability on the convenient fact that some historical event—like employer contributions to early multiemployer benefit plans—may have initiated a "tradition" that was followed and significantly expanded by employers after Eastern left the business. Such liability could not be justified by any concept of spreading costs to parties that caused a harm or an injury, nor as an allocation of liability to parties that reasonably should have expected to pay.

Contrary to the Government's assertions, this is not a case, like *Turner Elkhorn,* where damages were imposed on an employer for injuries suffered by employees as a result of

[7] In making this assertion, Eastern is not requesting the Court to engage in "courtroom factfinding," or to second guess an economic or social policy judgment as to which reasonable minds might differ, as the Government suggests. *See* Fed. Br. at 21-22, 32-33. Rather, Eastern seeks a determination of the constitutional significance of essentially undisputed facts concerning its historical participation in the coal industry. *See, e.g., Lopez*, 514 U.S. at 562.

exposure in the mines. 428 U.S. at 24-25.[8] Indeed, in *Turner Elkhorn*, the Court noted that retroactive liability for damages unrelated to an employer's conduct "would present difficulties not encountered in our prior discussion of retroactivity." *Id.* at 24. Nor is it a case like *Carlton*, where the executor of an estate took advantage of a provision in the estate tax laws that he should have known was a mistake, 512 U.S. at 28, 32, or *Concrete Pipe,* where a company voluntarily chose to participate in a multiemployer pension plan years after the plan members became subject to contingent withdrawal liability under ERISA, 508 U.S. at 608-09, 612, 639-40. Finally, this is not a case like *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, where Congress merely required the railroads to pay Amtrak's costs incurred in honoring (at the railroads' request) free travel passes that the railroads had previously issued to their employees, and from which the railroads enjoyed an ongoing benefit. 470 U.S. 451, 477 (1985). In sharp contrast to the foregoing cases, the Coal Act reaches back and imposes liability on Eastern merely because it agreed, more than thirty years earlier, to make specified contributions to a UMWA benefit plan to be distributed at the discretion of the trustees.

Finally, it is fanciful to suggest that the liability imposed by the Coal Act reasonably could have been anticipated by companies like Eastern. Given the span of retroactivity under the Coal Act, the Government's reliance on "expectations" to justify the Coal Act ignores the essential principle that parties should know the possible consequences of their acts. *See generally Landgraf*, 511 U.S. at 266. Without some reasonable temporal limit to the reach of retroactive statutes, the risks presented by inadequate notice are compounded. Indeed,

[8] While the Black Lung Benefits Act imposed liability on current operators with respect to former employees, each operator had the option—despite its causal contribution to miner injuries—to withdraw from the industry prior to the effective date of the statute and avoid liability. *Elliot Coal Mining Co. v. OWCP*, 17 F.3d 616, 620 n.3 (CA3 1994).

collective bargaining and other employment relationships would be seriously compromised if parties could not be confident that a past agreement, no matter how guarded or limited, would not form the basis for retroactive liability imposed by a legislature. If mere "participation" in providing a contract benefit to employees is a sufficient springboard for a subsequent, retroactive mandate to provide expanded benefits beyond the terms of the agreement (and well after its completion), then no employer or employee can ever justifiably rely on the finality and boundaries of a contractual undertaking.

2. Eastern Created No Plan Liabilities.

Purporting to rely on *Concrete Pipe*, the Government further argues that Eastern's Coal Act liability is rational because it redistributes to Eastern a liability that Eastern created by the provision of "service credits" to its employees. Fed. Br. at 31. In contrast to the situation in *Concrete Pipe*, prior to at least 1974 the accumulation of *any amount of* "service credits" did not provide any miner with a vested, enforceable right to health care benefits, and thus could not have led to the creation of any liability.[9] Because no amount of employment could have provided an employee a vested right to health benefits until well after Eastern's departure from the coal industry, Eastern is readily distinguished from the employer in *Concrete Pipe*. *See* 508 U.S. at 608, 638. Eastern did not create a liability by the employment of miners and then "shift" its responsibilities to remaining plan participants.[10]

[9] *See* Eastern Br. at 4-5. Indeed, the employment periods that qualified for "service credits" were also subject to retroactive modification and revision at the discretion of the trustees. *See* RA 1016; *compare* JA 264a *with* RA 892.

[10] In fact, EACC continued to mine Eastern's former coal reserves, making all of the contributions to the UMWA plans that Eastern would have made had it remained in the industry. Eastern Br. at 6-7.

3. Liability Cannot Be Justified by Virtue of Any Profit or Other Benefit Derived by Eastern.

The Government asserts that liability was properly imposed on Eastern by the Coal Act because Eastern "profited" from the "miners' labor and concessions given in exchange for better health benefits,"[11] and also from "the labor peace and industry-wide mobility of miners that were facilitated by the mechanism of portable service credits." Fed. Br. at 31-32. Once again, however, this cannot justify the retroactive liability imposed on Eastern. All companies "profit" from the labor of their employees, just as all employees "profit" from the benefits provided by their employers. If the mere existence of such "profit" justified the Coal Act, then Congress's power to rewrite expired contracts would be limitless. There is no connection, contractual or otherwise, between the "profits" that Eastern earned by employing the assigned miners from 1946 to 1965 and the need for health care by the miners and their dependents in the 1990s.

Similarly, the Government incorrectly contends that Eastern's receipt of substantial profits from its relationship with EACC "strongly reinforces the constitutionality" of retroactively imposing liability on Eastern. Fed. Br. at 35. The exclusive basis for Eastern's retroactive Coal Act liability, however, is its employment of the miners in question—the oft-repeated "pay for your own" premise

[11] The Government's assertion that the miners accepted lower pensions in exchange for better health benefits is legally irrelevant and factually unsupported. The only source cited for this alleged "concession" is the Executive Summary to the Coal Commission Report, which itself fails to cite any primary source for the assertion. In fact, the UMWA Funds and the BCOA represented to this Court in briefs submitted in *UMWA Health & Retirement Funds v. Robinson* that "eligibility standards and benefit amounts [were negotiated] for the first time" in 1974, and that previously all such determinations were made exclusively by the fund's trustees. Br. for Pet. UMWA Funds at 6-7; Br. Amicus Curiae for BCOA at 5-6; *Robinson*, 455 U.S. 562 (1982) (No. 81-61).

emphasized by the Respondents. *See* RA 2324 ¶30. Eastern's liability is not related to its relationship with EACC after 1965. *Id.* Congress considered the extent and circumstances in which control of a signatory operator might lead to liability, *see* 138 CONG. REC. S17603 (1992), and no liability attaches to Eastern on that basis. As shown by the plain language of the Coal Act, a parent corporation is liable for the burden of a subsidiary only if the parent was related to the subsidiary at the time the subsidiary ceased to exist, 26 U.S.C. §§ 9701(c)(2), 9706(a), or as of the date of the Coal Act's passage, § 9704(a). Because Eastern sold EACC to Peabody in 1987, and EACC continued to exist as a viable company, the only entity possibly subject to Coal Act liability because of its relationship with EACC is Peabody.[12]

C. The Coal Act Was Mere Political Expediency.

Finally, the Government suggests that the Coal Act properly imposed retroactive liability on Eastern because Congress could have concluded, following the veto of the industry-wide tax, that it was necessary to achieve an adequate solution to the funding crisis that was being addressed by the Act.[13] Fed. Br. at 34. Eastern has no way of assessing the correctness of this political calculation.[14] But to recognize

[12] Even if this Court were to rule that Eastern is entitled under 26 U.S.C. § 9706(f)(6) to obtain indemnification or contribution from Peabody or EACC, as the Government asserts, Eastern would remain primarily liable. The constitutionality of a statute cannot rest on the ability of a party wrongly burdened in the first instance to seek recompense from culpable parties of unknown financial resources.

[13] The inclusion of the pre-1978 signatories was not considered at any public hearing, debate, or in any legislative proposal until July 29, 1992 (the day the floor amendment adding pre-1978 signatories to the liability scheme was passed), and only then as an alternative to the industry-wide tax. 138 CONG. REC. S10783 (1992) (remarks of Sen. Rockefeller); STAFF OF HOUSE COMM. ON WAYS & MEANS, 103D CONG., FINANCING UMWA COAL MINER "ORPHAN RETIREE" HEALTH BENEFITS at 24 (Comm. Print 1993).

[14] In fact, less than seven percent of all beneficiaries were assigned under the Coal Act to the group of pre-1978 signatories known as "super-reachbacks." RA 1562.

that imposing liability on Eastern was politically expedient in no way supports the constitutionality of the Coal Act. Surely the political difficulty of finding other funding sources cannot justify the retroactive singling out of Eastern to solve an economic (or political) problem that it played no role in causing. *See Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (mere efficiency will not determine constitutionality). Otherwise, Congress would have unlimited power to reach back and impose liability on particular companies that made no contribution to the problem being addressed to avoid the politically unpopular option of a broader tax. *Cf. Landgraf*, 511 U.S. at 267 n.20.

For the foregoing additional reasons, the Coal Act as applied to Eastern violates the Due Process Clause.

III. THE COAL ACT EFFECTS A TAKING.

Because the Government views the Coal Act as mere economic regulation, it suggests that *Connolly* and *Concrete Pipe* are dispositive of Eastern's takings claim. This argument, however, does not address the essential character of the Coal Act—as applied to a company that has not been in the coal business for some years—as a direct appropriation of property, rather than mere economic regulation. Nor could Eastern have foreseen the Coal Act decades ago, and thus the statute dramatically disrupts Eastern's reasonable investment-backed expectations.

A. The Coal Act Is More Than Ordinary Regulation of Eastern's Property.

The Takings Clause requires the government to pay just compensation whenever it appropriates private property for a public purpose. To determine whether an impermissible taking has occurred, the Court must first review the nature of the government action. In doing so, the Court has traditionally distinguished between government action that directly appropriates property and government action that

merely regulates the uses made of that property.[15] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). The distinction between regulation and appropriation is fundamental.

Regulation manages and directs ongoing conduct; it governs the present usage of property. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1913 (1986). Under the Court's precedents, a statute that regulates ongoing conduct is subject to a Takings Clause test that balances the extent of the property right interference against the governmental interest advanced by the regulation. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). Thus, in rejecting a challenge under the Takings Clause to the MPPAA in *Connolly*, the Court said:

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others . . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

475 U.S. at 223; *see also Concrete Pipe*, 508 U.S. at 642-43.

Appropriations, by contrast, do not govern the uses of property and merely transfer property from one party to another or to the government for some purported public purpose.[16] *See* LAURENCE H. TRIBE, AMERICAN

[15] Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 392 (1922), it was generally thought that the Takings Clause did not apply at all to ordinary regulation, because as Justice Holmes noted, the "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every [exercise of its police power]." 260 U.S. at 413. In *Mahon*, however, the Court established the principle that regulation may violate the Takings Clause if it goes "too far."

[16] Of course, Congress has broad power under U.S. CONST. art. I, § 8, cl. 1 to "lay and collect Taxes" for the "common Defence and general Welfare of the United States." This Court, however, has recognized that a limited or targeted tax, such as the "premium obligation" involved in this case, may be "so arbitrary as to constrain to the conclusion that it [is] not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment." *Brusaber v. Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916).

CONSTITUTIONAL LAW at 588 (2d ed. 1988) (noting "constitutional law's undisputed condemnation of any law attempting to take property from A. and give it to B.") (internal quotation marks omitted).This is true by definition of a statute that applies to entities that are no longer engaged in the prohibited conduct, or are no longer participants in the industry governed by the statute.

As applied to Eastern, the Coal Act has the character of a direct appropriation—even though it arises from a statute that does regulate in some of its applications. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *see also Dolan v. City of Tigard*, 512 U.S. 374, 393-96 (1994); *Nollan*, 483 U.S. at 837; *cf. Concrete Pipe*, 508 U.S. at 648-49 (O'Connor, J., concurring). The Coal Act does not manage or direct Eastern's relationship with the UMWA plans. Instead, the statute seizes Eastern's funds (its property) and gives it to the Combined Fund to provide health care to a defined group of coal industry retirees and their dependents, resurrecting employment relationships long since defunct. If this essential nature of the Coal Act as applied to Eastern could be changed simply by labeling it a *mere* "regulation," then the second branch of the Court's taking jurisprudence (regulatory takings) would entirely eviscerate the first (direct appropriations).

B. The Nexus Requirement Is Applicable and Is Not Satisfied.

A direct appropriation is a taking requiring compensation unless there is a "nexus" between the conduct of the property owner and the harm addressed by the government action. *See Dolan*, 512 U.S. at 386; *Nollan*, 483 U.S. at 837; *Webb's*, 449

U.S. at 155, 163.[17] The nexus requirement ensures that a few persons are not singled out to bear a burden which in all fairness should be borne by the public at large. *Nollan*, 483 U.S. at 835 n.4.

The Government disagrees that the nexus requirement applies at all because this case involves an appropriation of money.[18] But the Fifth Amendment protects "property," not just real property, and there is no reason a different rule should be applied because money rather than land is involved. *See, e.g., Webb's*, 449 U.S. at 163-64 (money); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens on personal property). Apparently recognizing this, the Government also asserts that the Coal Act does not violate the Takings Clause because Congress reasonably concluded that "pre-1978 employers were partly responsible for retired miners' expectation of continued benefits and for the financial crisis in the Trusts." Fed. Br. at 44-45. However, as explained above, at the time Eastern made contributions to the UMWA plans, beneficiaries were specifically told that benefits could be reduced or eliminated at any time, and benefits were in fact

[17] In the traditional regulatory context, a perhaps less stringent nexus requirement applies, but will generally be satisfied, because the regulation typically will be directed at the harm sought to be avoided. *But see Pennell v. City of San Jose*, 485 U.S. 1, 20-21 (1988) (Scalia, J., concurring in part and dissenting in part)(opining that provision in local ordinance requiring that landlords pay for poverty problems they played no role in creating constituted impermissible taking). Thus, the concern expressed by Amicus, the California Cities and Counties, that application of the nexus requirement in this case will unduly constrain ongoing regulation is unwarranted.

[18] The Government contends that "it is highly significant" that the Coal Act does not appropriate assets directly to the government's own use, but rather distributes Eastern's assets to the Combined Fund. *See* Fed. Br. at 41-42. In fact, the Court has recognized that "taking analysis is not necessarily limited to outright acquisitions by the government for itself." *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *see also Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).

reduced and eliminated from time to time.[19] Additionally, the NBCWAs which Eastern signed specifically limited its obligations to providing per-tonnage contributions to the UMWA fund. *See* Eastern Br. at 3-4. Any expectations in contravention of those agreements cannot reasonably be traced to Eastern, and provide no nexus between Eastern's conduct and the harm addressed by the Coal Act. *See Connolly*, 475 U.S. at 235. (O'Connor, J., concurring).

Eastern's only connection with the beneficiaries assigned to it is that it employed the miners decades ago. Yet, nothing about that employment relationship caused the financial crisis in the UMWA benefit plans that Congress sought to address with the Coal Act. Nor did Eastern's exit from the coal business create any unfunded liabilities for the UMWA benefit plans, *see* Section II.B.2 *supra*. Because the Coal Act singles out Eastern to pay for problems that it played no role in creating, the nexus requirement is not satisfied, and the Coal Act, as applied to Eastern, effects a taking.

C. The Coal Act Interferes with Eastern's Investment-Backed Expectations.

Regardless of whether the Court considers the Coal Act a direct appropriation of property or a regulation, it is appropriate to consider the extent of the statute's disruption of Eastern's investment-backed expectations. This inquiry examines whether a property owner had any realistic opportunity to anticipate the government action and to adjust her conduct to avoid or minimize its adverse effect. *See*

[19] The Government notes that "with a few brief exceptions" the 1950 W&R Fund provided health benefits to miners throughout their lives. Fed. Br. at 5. *But see* Eastern Br. at 5 n.9 (citing contrary examples). The Government does not contest, however, that the miners' spouses and dependents, which make up more than 70% of the Combined Fund's beneficiaries, RA 1561, did not receive lifetime health benefits until at least several years after Eastern stopped participating in the UMWA plans, *see* Eastern Br. at 4 n.7, and only then as a result of specific provisions of a collective bargaining agreement. *See Robinson*, 455 U.S. at 567.

Babbitt v. Youpee, 117 S. Ct. 727, 734 (1997) (Stevens, J., dissenting). Here, the Coal Act imposes a harsh new liability on Eastern that it could not have foreseen in 1965.

The Government asserts that the Coal Act did not interfere with Eastern's investment-backed expectations because, at the time that it was contributing to the UMWA benefits plans, Eastern should have foreseen, based on the government's prior actions, that "Congress might again impose additional obligations on coal operators [with respect to such plans]." Fed. Br. at 47. The Government refers specifically to President Truman's 1946 takeover of the coal mines and the subsequent creation of a fund to provide health benefits to miners,[20] the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* (the "Taft-Hartley Act"), and the Government's subsequent surveys of coal miners' health care needs. The Government also refers to ERISA, though ERISA was enacted long after Eastern had ceased mining coal in 1965.

On the basis of these indications of federal government involvement in the industry, the Government invokes the statement in *Connolly* that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 475 U.S. at 227. The "regulated field" justification, however, has been applied only in circumstances that involve the modification of an established regulatory scheme.[21] In *Connolly*, employers continued their participation in multiemployer pension plans after the enactment of ERISA, a comprehensive federal regulatory framework, had already introduced the possibility of withdrawal liability.

[20] The operators had every reason to consider the 1946 takeover to be a taking. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[21] *See, e.g., Ruckelshaus*, 467 U.S. at 1006-1007 (entity gaining benefit from voluntarily divulging trade secret to EPA has no investment-backed expectations that secret will not be disclosed); *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958) (no investment-backed expectations where company voluntarily participated in subsequently amended federal insurance program).

When a subsequent amendment (MPPAA) adjusted the terms and conditions of withdrawal liability, the Court readily concluded that participants could have foreseen that the withdrawal scheme might be modified. 475 U.S. at 227.

Unlike the situation in *Connolly*, however, there had never been, prior to the Coal Act, any regulatory scheme governing the provision of retiree health benefits in the coal industry, or in any other industry.[22] In fact, the initial plan established by the Secretary of Labor and the UMWA in 1946 required the miners themselves to fund their own health benefits through payroll deductions. JA 263a. The subsequent Taft-Hartley Act merely authorized companies and unions to establish separate welfare plans to be administered by independent trustees. 29 U.S.C. § 186. It did not, in contrast to the pension requirements of ERISA, regulate the funding of such plans, or require mandatory vesting, the provision of defined benefits, or any withdrawal or termination liability. Moreover, the fact that "surveys" of miners' health care needs were conducted hardly foreshadowed the Coal Act's subsequent imposition of liability on companies that had left the coal business entirely.

The Government's suggestions, therefore, reduce to the proposition that any prior Government attention to an industry provides fair notice that sweeping, retroactive liability may be imposed at any time in the future. The Court has never gone so far, and such a rule would eviscerate any protection of reasonable investment-backed expectations. It is particularly unreasonable to suggest that an operator such as Eastern could have foreseen that Congress might impose liabilities arising out of completed transactions in the coal business—without regard to when the operator had left the mining business or the scope of the commitments made to the miners by the operator.

[22] *See* GAO, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE NO. GAO/HRD-90-92 at 3 (Mar. 1990).

Finally, the Government contends that, because Eastern continued to receive dividends from EACC, it should have anticipated that EACC's ongoing liability for contributions to the UMWA benefit plans might result in liability to Eastern for employment relationships terminated before EACC was created. Fed. Br. at 47-48. The Government provides no rationale for this contention, and it is contrary to common sense notions of investor expectations. No corporate parent would expect to bear *any* liability arising from conduct of an independent and well-capitalized subsidiary, such as EACC. Furthermore, the Coal Act imposes liability on Eastern solely based on Eastern's employment of miners in years prior to 1966. It is not sensible to suppose that Eastern could have anticipated in 1965, or in 1987 (when Eastern sold EACC to Peabody) for that matter, that Congress would introduce a "pay for your own" approach in 1992 that would reach employment relationships that terminated between 1946 and 1965. To suggest otherwise is contrary to longstanding principles of finality and repose on which Eastern had every reason to rely.

For the foregoing additional reasons, the Coal Act as applied to Eastern violates the Takings Clause.

CONCLUSION

For the reasons stated in Eastern's initial brief and in this Reply Brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN T. MONTGOMERY
Counsel of Record
JOHN H. MASON
ROBERT DANIEL O'CONNOR
DALILA ARGAEZ WENDLANDT
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7000

L. WILLIAM LAW
SARA JOHNSON MYERS
EASTERN ENTERPRISES
9 Riverside Road
Weston, MA 02193
(781) 647-2300

(9)

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IN THE

Supreme Court of the United States

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EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF ALLIEDSIGNAL INC., THE LTV CORPORATION AND BELLAIRE CORPORATION, IN SUPPORT OF PETITIONER

DONALD B. AYER
(Counsel of Record)
JONATHAN C. ROSE
JAMES E. GAUCH
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Amici Curiae, AlliedSignal, Inc., The LTV Corporation and Bellaire Corporation

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STATEMENT OF INTEREST[1]

Each of tne three *amici* formerly mined coal under National Bituminous Coal Wage Agreements ("NBCWAs") signed with the United Mine Workers of America ("UMWA") and have therefore been charged with liability for retiree health benefits by the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 ("Coal Act").

AlliedSignal Inc. ("Allied") last signed a NBCWA in 1978 and stopped mining coal in 1980. During litigation spawned by its exit from the industry, Allied obtained a judgment that its funding obligations continued "only for the life of the 1978 contract" and thus had expired in 1981. *See District 17, UMWA v. Allied Corp.*, 765 F.2d 412, 417 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985). The Fourth Circuit ordered Allied to continue funding certain retiree health benefits, however, as a remedy for Allied's breach of an entirely separate provision. *See id.* To resolve this disputed obligation, Allied entered into a consent judgment in which it agreed, notwithstanding the earlier ruling, to provide health benefits to retirees from a single mine. The Coal Act now requires Allied to provide lifetime health benefits to retirees at a total estimated cost of $50 million.

The LTV Corporation and its subsidiaries ("LTV") last signed a NBCWA in 1984 and stopped mining coal in 1987. The Second Circuit subsequently ruled that LTV's obligations to pay for retiree health benefits had ended when the 1984 NBCWA expired. *LTV Steel Co. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1208 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992). Shortly after this decision, the Coal Act reimposed a duty

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[1] Counsel for all parties have consented to the filing of this amicus brief, and *amici* have filed those consents with the Clerk of Court. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6.

on LTV to pay approximately $140 million to UMWA retirees.

Bellaire Corporation, whose ultimate parent is Nacco Industries, Inc., and its related companies ("Bellaire") last signed a NBCWA in 1984 and stopped mining bituminous coal in 1988. When Bellaire sold its last bituminous coal mining operations, as part of a severance arrangement with the union, Bellaire agreed to provide health benefits, but only through January 1990. The Coal Act now requires Bellaire to provide lifetime benefits at an estimated total cost of $100 million, and Bellaire has no way to pass any of those costs through to utilities who operated many of Bellaire's mines (and purchased its coal) decades ago under cost pass-through contracts. This amount is about nine times greater than Bellaire actually contributed under the NBCWAs and seventy times greater than the average annual profits Bellaire made from coal mining.

Accordingly, each of the *amici* has been subjected to many millions of dollars in liabilities imposed under the Coal Act on the basis of conduct that occurred years earlier. *Amici* file this brief to demonstrate that the Coal Act's retroactive obligations cannot be constitutionally justified.

ARGUMENT

THE COAL ACT IS UNCONSTITUTIONAL BECAUSE IT RETROACTIVELY TRANSFERS SUBSTANTIAL ASSETS BETWEEN NARROW CLASSES OF PARTIES WITHOUT ANY JUSTIFICATION BASED UPON THOSE PARTIES' PRIOR DEALINGS OR EXPERIENCE

The Coal Act exemplifies the sort of arbitrary legislative transfer of property that the Due Process and Takings Clauses condemn. The Act uniquely combines three characteristics that, taken together, have never been sustained by this Court. Without restating the framework of analysis applicable to the constitutional protections, which is fully set forth in Petitioner's Brief, *amici* will

instead identify and discuss these three unique features of the Act, whose arbitrary effects exacerbate each other with a cumulative impact wholly unprecedented in the cases of this Court.

First and most important, the Coal Act's requirement that companies pay lifetime health benefits for persons employed in the distant past (as well as their dependents) has no rational justification. Notwithstanding the unexamined comments of several appellate courts (including the court below) to the contrary, there is no basis, legal or moral, on which to justify placing this grossly disproportionate burden on the former employers. Those parties at no time agreed to provide the benefits at issue, and they certainly cannot be charged with responsibility for causing the need for comprehensive medical care in retirement, which is a need shared by all persons and not just by those who have been coal miners, unlike the black lung benefits at issue in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

Second, the Coal Act's obligations are imposed over a breathtaking, retroactive span of several decades. Parties like Eastern Enterprises who employed their last miner in the 1960's—and indeed others who are being charged for people they last employed just after World War II—surely had their reasonable investment backed expectations shattered when they learned in 1992 that major new obligations had been created on the sole basis of those ancient employment relationships. This Court finds legislation retroactive only reluctantly and views it with special concern. The Coal Act's retroactivity is remarkable in the extreme.

Third, as legislation shifting obligations among small groups of individuals and corporations, the Coal Act has the character of legislation for the private benefit of a few at private rather than public expense. This transformation of a public expense into a private one demands the special attention of this Court.

On these grounds, *amici* submit, the Coal Act must be struck down as applied to Eastern and others similarly situated. By so doing, the Court would open no Pandora's box nor in any way call into question its long line of authority reaffirming Congress's broad powers to enact economic legislation. On the contrary, by presenting the exceptional case where Congress has crossed the line of limitation established by rational basis review, the Coal Act confirms the value and importance of the constitutional scrutiny for minimum rationality. A deferential standard of review does not mean no review at all, *see United States v. Lopez*, 514 U.S. 549, 556-57 (1995), and under any appraisal of the Coal Act's fairness and rationality, it cannot stand.

A. The Imposition of Obligations Under the Coal Act Is Not Supported by Any Preexisting Contractual or Moral Obligation, or by Any Basis in the Parties' Prior Dealings or Experience

At virtually every step, the court below based its analysis on the premise that Eastern somehow contributed to an expectation of—or perhaps expressly promised—lifetime benefits to retirees and their beneficiaries. That assumption was central to both its due process [2] and takings [3] analyses. The available evidence does not remotely support such a conclusion. Apart from the cursory mention of several important contractual provisions, Pet. App. A-4, the court below made no further direct reference to any relevant NBCWA. Whether this Court examines only the agreements before 1965, when Eastern exited the coal industry, or later NBCWAs, there is simply no evidence of such promises, or of any other basis from which a legal or moral obligation can be inferred. The courts too often have accepted without analysis [4] the assertions of the Coal Commission to the contrary.[5] Absent such a presumed relationship between miners' expectations on the one hand and the conduct of Eastern and other companies on the other, there is no rational basis on which the Coal Act can withstand constitutional scrutiny.

[2] *See* Pet. App. A-13 ("Since Eastern, as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational."); *id.* at A-15 ("If the expectations [of lifetime benefits] had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen.").

[3] *See id.* at A-21 ("Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans."); *id.* at A-22 ("Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered.").

1. *The NBCWAs Themselves and the Historical Evidence Establish Beyond Any Doubt That No Reasonable Expectations of Lifetime Health Benefits Were Created Before 1974*

Prior to 1978, retiree health benefits in the unionized sector of the bituminous coal industry were provided through a multiemployer plan and funded on a pay-as-you-go basis through contributions from all current NBCWA signatories. Each employer's duty to contribute to the plan was always based on its current coal production, and that duty was expressly and repeatedly limited to the term of the current agreement. *See, e.g.*, RA at

[4] *See, e.g., Holland v. Keenan Trucking Co.*, 102 F.3d 736, 741 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of Health & Human Servs. (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 519 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 488 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

[5] The Coal Commission report must be read in light of the interests of those who served on the Commission. The coal industry nationwide was represented only by persons affiliated with the UMWA and with signatories to the then-current wage agreement. The Commission found that legislation was needed to meet the costs of retiree benefits agreed to in the most recent NBCWA and justified that conclusion by reference to promises of lifetime benefits for which there is no factual basis.

618 (1947 NBCWA), 630 (1948 NBCWA), 638 (1950 NBCWA), 668 (1950 NBCWA, as amended 1964). Retiree health and pension benefits were paid from the same fund as benefits for current employees, and the employer's obligation was wholly unrelated to how many retirees, if any, were eligible for benefits.

This multiemployer, pay-as-you-go system, which began in 1947, was tailored to the coal industry's unique nature:

> The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers retirement benefits *without linking specific workers to specific employers.* They have done this through national, multi-employer agreements between the [UMWA] and a multi-employer association of coal producers, the Bituminous Coal Operators Association [("BCOA")]. All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds *without reference to the employers they happened to be working for at the time of their retirement.*

Connors v. Link Coal Co., 970 F.2d 902, 903 (D.C. Cir. 1992) (emphasis added). This system assured retirees whatever benefits the current NBCWA established, only during and limited to the life of that agreement.

Yet, as the First Circuit recognized below, Pet. App. A-13, nothing in the agreements imposed any contractual obligation on the signatory employers beyond the term of the agreement. The NBCWAs state unambiguously that all rights and duties created—including (1) retirees' rights to health benefits and (2) employers' duties to contribute—expired at the end of each NBCWA. The agreements bound their signatories to contribute to health benefits on a per-ton basis only "during the life of [each] Agreement." *See, e.g.*, RA at 638 (1950 NBCWA), 668 (1950 NBCWA, as amended 1964), 688 (1950 NBCWA, as amended 1966), 706 (1968 NBCWA), 729 (1971 NBCWA).

Most importantly, beneficiaries were not assured of any particular level of benefits. Instead, the fund trustees had "full authority" to alter, add and terminate these benefits. *See* RA at 639 (1950 NBCWA), 707 (1968 NBCWA) 730 (1971 NBCWA). Eastern thus signed NBCWAs reflecting the expectation that once a contract had expired, the operator would have no additional retiree benefit obligations.

Thus, even if miners and retirees assumed that they would be assured health benefits in perpetuity, this belief was unsupported by the agreements negotiated on their behalf. Moreover, while their formidable union certainly fought hard for the benefits they desired, it was not obligated to continue to do so at each subsequent contract negotiation. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 (1971). Therefore, as Eastern's brief demonstrates, there is no rational basis for imposing liability on Eastern to pay for benefits based on allegations that its retirees misperceived the NBCWA's terms.

2. *Looking Beyond 1974, the NBCWAs Expressly Limited the Obligations Undertaken to the Life of the Agreement*

Lower courts upholding the Coal Act have erroneously justified their decisions by reference to a supposed commitment to provide lifetime benefits beginning with the 1974 and 1978 NBCWAs.[6] But even if the Court looks to those agreements, the conclusion is the same: there was no obligation. To be sure, the plans did become more complex, largely in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461

[6] The 1981 and 1984 NBCWAs, which are not in the record, impose essentially the same obligations as the 1978 NBCWA.

("ERISA").[7] Moreover, after 1978, the health care plans changed toward a decentralized system in which post-1974 and future retirees would now receive benefits from individual plans operated by their last signatory employer. The multiemployer plans were retained, nevertheless, to provide benefits for miners who, because their employers had left the industry, would otherwise receive no health benefits. RA at 778-79 (1978 NBCWA). Most important, those multiemployer plans continued to be funded only by current NBCWA signatories through contributions that continued to be limited to the "life of th[e] agreement."

a. *The Obligation to Contribute Was Limited to the Life of the Agreement*

The provision of the NBCWA addressing employers' obligations to contribute limited those obligations in three key respects. First and most importantly, by its terms, the contribution requirement applied only "[d]uring the life of this Agreement." RA at 749 (1974 (NBCWA), 779 (1978 NBCWA).[8] Second, the same provision specifically required contributions only by "each *signatory* Employer." RA at 749, 779 (emphasis added). It made no reference to signatories of previous NBCWAs. The NBCWA later described the contribution requirement in similar terms: "This obligation of each Employer *signatory hereto*, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer *during the life of this Agreement* . . . ." RA at 752 (1974 NBCWA), 783 (1978 NBCWA) (emphasis added). Based on these two limitations, if a company declined to

[7] The 1974 NBCWA split the UMWA trust fund into four separate trusts, two providing pensions and two providing welfare and health benefits. The welfare and health benefit plans were the 1950 Benefit Plan and Trust, which covered those retiring before 1976, and the 1974 Benefit Plan and Trust, which covered those retiring later. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 566 (1982); RA at 748-49.

[8] Certain contributions were required for a shorter period of time, but none extended beyond the NBCWA's termination date.

join the next multiemployer bargaining unit, it clearly would have had no contribution obligation after the agreement it signed expired. Third, each NBCWA determined a signatory employer's contribution solely on the basis of detailed production-based measures.[9] Thus, if a company ceased bituminous coal mining altogether, as virtually all of the companies burdened by the Coal Act did, its obligation to contribute would effectively end, even without regard to the other two express limitations.

[9] The 1974 NBCWA shifted from a pure per-ton contribution rate to a formula based on both tonnage produced and hours worked. The 1974 NBCWA provided in part:

> (1) *During the life of this Agreement*, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute . . . the amounts specified below based on cents per ton . . . coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement:
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> * * *
>
> (ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, . . . and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;
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> * * *
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> (iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 70.8¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 77.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 88.0¢ per hour on each such hour worked.

RA at 749 (emphasis added); *see also, e.g.*, RA at 779-80 (1978 NBCWA). In 1988, the NBCWA changed the formula to a pure hourly basis. RA at 820.

b. *The Beneficiaries' Right to Coverage Existed Only During the Term of the Agreement*

Like the employers' obligations, the beneficiaries' coverage was also at every relevant point explicitly limited to the term of the agreement. For example, although the 1978 NBCWA defined benefit levels, it required only that, under the individual employer plans, "benefits . . . shall be guaranteed *during the term of this Agreement* by each Employer at levels set forth in such plans." RA at 778 (emphasis added). Likewise, with respect to miners covered by the multiemployer plan, the Agreement stated: "The 1974 Benefit Plan and Trust shall continue . . . for the sole purpose of providing health and other non-pension benefits, *during the term of this Agreement*, to any retired miner . . . who would otherwise cease to receive the health and other non-pension benefits provided herein . . . ." *Id.* (emphasis added).

c. *The Guarantee Clause Imposed Obligations Only During the Term of the Agreement*

Beginning in 1978, the NBCWA included a separate provision, known as the "guarantee clause," in which the employers guaranteed certain benefit levels. *See* RA at 787-88 (1978 NBCWA), 828 (1988 NBCWA).[10] Like

[10] The guarantee clause read:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.*
>
> In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.* These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto *during the term of this Agreement.*

RA at 787-88, 827-28 (emphasis added).

the contribution provisions discussed above, however, the guarantee clause contained two key limitations. First, the benefits were guaranteed only "during the term of this Agreement." RA at 787-88, 828. Indeed, although some courts, including the court below, have relied on the guarantee clause to support the Coal Act's perpetual burdens, *see, e.g.*, Pet. App. A-4; *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1118 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 483 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995), the only one to have discussed the terms of the clause recognized that any "guarantee" existed "only until the expiration of that Agreement," *id.* Second, the guarantee clause required any necessary increased contributions to "be made by all Employers *signatory hereto*"—thus expressly excluding former signatories. *Id.* at 788 (1978 NBCWA), 828 (1988 NBCWA) (emphasis added).

This understanding of the guarantee clause has been repeatedly confirmed in court decisions applying it. Thus, the courts have, at the insistence of the benefit funds' trustees, specifically enforced the guarantee clause against current signatories, requiring them to increase their contributions to make up a shortfall in the UMWA funds.[11] In contrast, the courts have repeatedly rejected the trustees' attempt to apply the guarantee clause to require companies to pay benefits to their former employees beyond the life of the NBCWAs that the companies signed.[12]

[11] See *McGlothlin v. Connors*, 142 F.R.D. 626, 646 (W.D. Va. 1992); *UMWA 1950 Benefit Plan & Trust v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177, 181 (D.C. Cir. 1990).

[12] *UMWA v. Nobel*, 720 F. Supp. 1169, 1180 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *see also LTV Steel Co. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1210 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985); *District 29, UMWA v. UMWA 1974 Benefit Plan & Trust*, 826 F.2d 280, 282-83 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Schifano v. UMWA 1974 Benefit Plan & Trust*,

d. *The Termination Clause Contemplated That Benefits Would End With the Contract*

Finally, the section of the NBCWA addressing the manner in which the agreement may be terminated clearly indicates that the contribution obligation does not survive the termination of the agreement. The clause in the 1978 NBCWA, for example, contains a single specific exception for the continuation of health benefits beyond the agreement's termination, which states that in the event of an economic strike, employers must continue benefits for 30 days, after which the employees must pay for the benefits. RA at 797-98; *see also* RA at 858-59 (1988 NBCWA). If the contracts were intended to require former signatories to provide health benefits after the agreement expired in any circumstances other than this 30 day provision relating to economic strikes, it is inconceivable that such an intention would not likewise have been made explicit.

e. *The "Health Services Card" Language and "Evergreen" Clause Are Not to the Contrary*

The only allusion at all to lifetime entitlements in the NBCWAs, first inserted in 1974, is found in a "General Description of the Health and Retirement Benefits." RA at 788 (1978 NBCWA), 829 (1988 NBCWA). This description provides that a pensioner fitting a certain description "will be entitled to retain his Health Services card until death, and upon his death, his widow will retain a Health Services card until her death or remarriage." *See* RA at 755 (1974 NBCWA); 788-91 (1978 NBCWA); 830-31, 833 (1988 NBCWA). Some courts have seized upon this language as evidence of a promise of lifetime health benefits. *See, e.g., In re Chateaugay*, 53 F.3d at 482. Yet this language does not guarantee a particular level of health benefits, or indeed any benefits at all.

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655 F. Supp. 200, 204 (N.D.W. Va. 1987); *Box v. Coalite, Inc.*, 643 F. Supp. 709, 711-12 (N.D. Ala. 1986).

Providing a health card for life does not guarantee certain benefits but instead simply assures that miners and retirees will be entitled to participate in whatever benefits plan, if any, is in effect. Such a provision makes sense in an industry where employers and employees come and go as mines are exhausted. *See Connors*, 970 F.2d at 903. Indeed, to the extent that this system ensured that miners' benefits went with them when they changed employers—or, in modern terms, were "portable"—the NBCWAs addressed a problem that is arguably becoming more widespread in society. *See generally* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. Such a system does nothing however, to alter the expectation that any particular benefit level is limited to the term of a particular agreement, as the NBCWAs and summary of benefits both made clear.

Thus, as far as retired miners and their beneficiaries were concerned, provision of the health card for life ensured that they would not be cut loose by the union and the signatory coal companies—that instead they would participate in the same health benefits program as active miners, even if the particular companies they worked for long ago folded or left the industry. This commitment's value depended on the union's ability to continue to negotiate contracts providing generous retiree benefits. Coal miners may have placed considerable faith in that ability, but whatever they expected their union to achieve in the collective bargaining process is not attributable to any promise or conduct by their employers or former employers. Nothing in the agreement suggests otherwise. To the contrary, the Description of Benefits itself made clear that the term of health benefits was limited, distinctly declaring that health "benefits are guaranteed *during the term of this Agreement, subject to the terms of this Agreement*." RA at 792 (1978 NBCWA), 836 (1988 NBCWA) (emphasis added).

Moreover, the NBCWAs make clear that this section merely attempted to summarize the trust fund documents and was not independently binding:

> This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts . . . .

RA at 788 (1978 NBCWA), 829-30 (1988 NBCWA); *see also* RA at 759 (1974 NBCWA).

Similarly, the so-called "evergreen clause" created no obligation, moral or otherwise, with respect to benefits after a particular agreement expired. That provision required employers whose employees participated in the pension or benefit plans to comply with the terms of the trusts, including "making the contributions required under the [current] National Bituminous Coal Wage Agreement . . . as amended from time to time, and any successor agreements thereto." *See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 471-72 n.1 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). It was inserted in the pension and benefit plan documents (not the NBCWAs themselves) shortly after the 1978 NBCWA was signed and ratified. Some courts, including the court below, *see* Pet. App. A-4; *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127 (4th Cir. 1996); *In re Chateaugay*, 53 F.3d at 483, have supported the Coal Act's constitutionality by finding in the "evergreen clause" a promise of perpetual health benefits.

When the clause was added to the pension and benefit trusts in 1978, however, it did nothing to change the traditional allocation of responsibility for retiree benefits, under which current NBCWA signatories jointly shared the costs of retiree health benefits. Because the clause merely refers to the "contributions required under" the NBCWA, it imposes no independent obligation to contribute beyond that set forth in the relevant NBCWA section. As explained above, the NBCWA contains several key limitations to the effect that employers were required

only to contribute "during the life of the Agreements." Those are squarely contrary to any perpetual liability theory, and indeed the NBCWAs contain not the slightest hint that any obligation continued after the life of the agreement.

Additionally, the "evergreen clause" by its terms reflects an understanding that it applies against only current signatories because the contribution obligation that it incorporates was always defined in terms of coal production. If a former signatory no longer mined bituminous coal, there would be no basis for assessing any contribution obligation.[18] For that reason, an earlier Federal Respondent recognized:

> The evergreen clauses did not create any obligation to contribute for companies . . . that left the coal mining industry because the Wage Agreements generally required contributions to the benefit plans on a per-ton-of-coal-mined and coal-miner-hours-worked basis. Any party who had ceased coal mining operations . . . thus would no longer be obligated to make contributions.

Br. for Secretary of Health and Human Servs. at 6-7, n.* (citations omitted), *In re Chateaugay Corp.*, 53 F.3d 478.

3. General Labor Law Practices and the Parties' Course of Dealing Confirm That Benefits and Obligations Were Limited to the Life of the Agreement

Extrinsic evidence confirms that retiree health benefits were "negotiated on a contract-by-contract basis," as the Fourth Circuit has recognized. *District 17, UMWA v. Allied Corp.*, 735 F.2d 121, 126 (4th Cir. 1984), *vacated on other grounds*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985). In that case, a negotiator for the UMWA, when asked specifically about retiree

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[18] Indeed, the only decision upholding "evergreen" liability, *UMWA 1974 Pension Trust v. Pittston Co.* (*In re UMWA Employee Benefit Plans Litig.*), 782 F. Supp. 658 (D.D.C. 1982), *aff'd*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993), did so against three companies still engaged in bituminous coal mining.

health benefit levels, testified that "[e]verything is open for renegotiation at the end of the contract." The chief employer negotiator agreed that the parties always had "negotiate[d] on the basis of the term of the contract" and could have agreed, in a future NBCWA, "to provide no benefits for retirees." *Id.* at 126-27.

This course of dealing, and the explicit contract language limiting the term of obligations created, is entirely consistent with fundamental labor law principles under which the parties' decisions to negotiate a collective bargaining agreement—or a series of them—do not create contractually enforceable commitments that extend beyond the terms of their agreements. Thus, this Court has held that, under ERISA, obligations to contribute to a plan "will cease, in the ordinary course, upon termination of the bargaining agreement," *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) (discussing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.").

Exceptions to this rule are found only when commanded by the "explicit terms" of the collective bargaining agreemnt. *Litton*, 501 U.S. at 207; *see In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 901 (3d Cir. 1995); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993). Courts have thus held that the commitments of these specific NBCWAs, as with other "[e]mployer obligations and employee rights, under a collective bargaining agreement, do not survive the expiration of the agreement absent a clear indication of the parties." *Allied Corp.*, 735 F.2d at 127.

Moreover, in general, an employer cannot be forced to continue in multiemployer bargaining arrangements based

on its participation in predecessor agreements. Multiemployer units with voluntary membership are traditional vehicles for collective bargaining. *NLRB v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87, 94-95 (1957). As this Court has ruled, multiemployer bargaining "neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." *Charles D. Bonnano Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982). So when each NBCWA expired, each company was free to leave the multiemployer bargaining unit and bargain with its employees separately, as employers regularly did.

There are good reasons for limiting obligations to the term of the collective bargaining agreement. As then-Judge Breyer noted, indefinite obligations are "particularly inappropriate in the field of labor relations, where fluctuating economic circumstances ordinarily call for the ability to adapt to changes." *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 638 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). These concerns are particularly acute with health care coverage, which "must take account of inflation, changes in medical practice and technologies and increases in the costs of treatment depending on inflation"—factors that "prevent accurate predictions of future needs and costs." *Wise*, 986 F.2d at 935 (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). They are especially relevant in an extractive industry like bituminous coal mining where employers may simply shut down when their resources are depleted.

Courts have thus repeatedly confirmed that "the coal company's responsibility to provide health benefits to retired employees under a negotiated [NBCWA] terminated with the expiration of that Wage Agreement," [14] and have

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[14] *In re Chateaugay Corp.*, 945 F.2d at 1210; *see UMWA 1974 Benefit Plan & Trust*, 826 F.2d at 282; *Royal Coal Co.*, 768 F.2d at 590-92; *Allied Corp.*, 765 F.2d at 417; *Nobel*, 720 F. Supp. at 1176-78; *Schifano*, 655 F. Supp. at 204; *Box*, 643 F. Supp. at 711-12.

refused to impose obligations on employers who have not signed successor Agreements to pay for health benefits through the Benefit Trust. In one case, the Second Circuit declared that *amicus* LTV Corporation was not required to pay into the health benefit fund when it stopped agreeing to do so. *LTV Steel Corp. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1209 (2d Cir. 1981), *cert. denied*, 502 U.S. 1093 (1991). The Coal Act then imposed liability on LTV based on an assumption that it had promised to continue to pay for lifetime health benefits, when in fact the Second Circuit had already decided that LTV had made no such promise.

B. The Coal Act Imposes Burdens Retroactively Upon Completed Conduct, Over a Span of Several Decades

The arbitrariness of the Coal Act's burdens, imposed as they are without any rational basis in antecedent obligations or conduct, is greatly aggravated by the Act's remarkable retroactive reach. Because the Coal Act " 'creates a new obligation . . . in respect to transactions or considerations already past,' " it " 'must be deemed retrospective.' " *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (C.C.N.H. 1814) (Story, J.)). When the Coal Act was enacted in October 1992, Eastern could do nothing to conform its conduct to avoid future liability. The liability of Eastern under the Act was based solely on past acts—Eastern's fully satisfied undertakings between 1947 and 1965 to make specified contributions to a retiree health benefit plan during that discrete time frame.[15]

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[T]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process,

[15] *Amicus* Allied stopped mining coal a dozen years before the Coal Act passed, and the other *amici* were subjected to somewhat shorter, though still unprecedented periods of retroactivity.

and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17; *see Landgraf*, 511 U.S. at 266; *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects"). This scrutiny of retroactive legislation is "an essential thread in the mantle of protection that the law affords the individual citizen," *Lynce v. Mathis*, 117 S. Ct. 891, 895 (1997), and one of our most "elementary considerations of fairness":

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Landgraf, 511 U.S. at 265 (footnotes omitted); *see Hughes Aircraft Co. v. United States ex rel Schumer*, 117 S. Ct. 1871, 1876 (1997); *BMW v. Gore*, 116 S. Ct. 1589, 598 (1997); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

It is because, as Justice Story succinctly observed, "[r]etrospective laws are, indeed, generally unjust," 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1994), that the Ex Post Facto Clause flatly prohibits the retroactive imposition of criminal liability, *see, e.g., Weaver v. Graham*, 450 U.S. 24, 28 (1981). Also for that reason, this Court applies a "very strong" presumption that a civil statute "was not meant to act retrospectively," *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) (citation and quotation omitted).[16]

[16] *See also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) ("a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936) ("[L]aws should not be enforced

Among the most disfavored retroactive statutes are those affecting contractual relationships: "matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271. With a decades-long period of retroactivity, the Coal Act clearly "sweep[s] away settled expectations," *id.* at 266, as to these relationships. Many former NBCWA signatories no longer mine bituminous coal at all and thus can no longer pass along the sudden Coal Act liabilities into the product's price. Also, the signatories did not operate in a vacuum but instead operated under a complex skein of contractual relationships. For example, some merely owned the mines and sold the coal to operator-utilities who actually managed and ran the mines and contractually assumed all related liabilities. Most of those contracts terminated long ago and many parties involved no longer exist, making it impossible to recover on the cost pass-through provisions. Because of the extraordinary span of its retroactivity, the Coal Act thus imposes obligations based on a particular historical relationship when virtually all surrounding contractual context, under which many parties shared or reallocated particular risks, has vanished.

Thus, the Coal Act is unprecedented in its imposition of wholly new obligations unjustified by the prior conduct of the parties, on the basis of events that ended years, or in many cases, decades earlier.

C. The Coal Act Effects a Direct Transfer of Substantial Assets Between Narrow Classes of Parties

The Coal Act entitled one extremely narrow class of persons—UMWA retirees who worked under one or more wage agreements signed with BCOA members—to receive a benefit that few Americans enjoy as a matter of right. No one questions the power of Congress to single out particular groups to receive certain benefits—even benefits as unusual as the generous lifetime medical benefits conferred by the Coal Act. The question, though, is who

before the subjects have an opportunity to become acquainted with them.") (citing 1 William Blackstone, *Commentaries* *46 (1765)).

must pay for such congressional generosity. Eastern's liability alone is estimated at over $100 million. Pet. App. A-20. The pre-1988 signatories as a group have thus far been assessed approximately $60 million *per year* to fulfill the Coal Act's mandates. *See* Staff of the House Comm. on Ways and Means, 104th Cong., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, at 23, 31, 33 (Comm. Print 1995) (reflecting billings of $62,027,326 for fiscal year 1994 and similar premium levels for fiscal year 1995). That amount is a direct savings to the BCOA companies over what they would have been obligated to pay under the 1988 Wage Agreement.[17]

The legislature's "unmatched powers . . . to sweep away settled expectations suddenly and without individualized consideration," *Landgraf*, 511 U.S. at 266, pose special dangers "in the hands of enterprizing and influential speculators," The Federalist No. 44, p. 301 (J. Cooke ed. 1961). Indeed, the particular advantage from the viewpoint of those who promote a retroactive statute is that it "'may be passed with an exact knowledge of who will benefit from it.'" *Landgraf*, 511 U.S. at 267 n.20 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960)).

Here, that is exactly what happened. The BCOA, which included the largest coal producers in the United States, such as Consolidation Coal (a duPont subsidiary), Peabody Coal Co., and Cyprus Amax, succeeded in persuading Senator Rockefeller and Congress as a whole to relieve it of the obligations to finance retiree health bene-

[17] Paul W. MacAvoy has stated concerning the Coal Act: "The Reachback provision was, and continues to be, an unjustifiable tax on other firms that lowers the cost of health care payments by coal companies that signed the 1988 NBCWA contract". *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 189 (1995) (Statement of Paul W. MacAvoy On Behalf of The Reachback Tax Coalition) ("MacAvoy Statement").

fits that it had voluntarily taken on in the 1988 NBCWA, an agreement still in effect when the Coal Act became law. The diverse companies on whom the burden fell were ill-equipped to resist the BCOA and UMWA's combined influence.[18]

The exceptionally narrow class of former employers burdened under the Act, the equally narrow class of then-current Wage Agreement signatories whose contractual burdens the Coal Act lightened, and the highly focused character of the beneficiary class together give the Coal Act the character of a simple reallocation of resources from one party to another. Such enactments have been long deemed impermissible under our Constitution. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Opinion of Chase, J.) (statutes cannot "tak[e] property from A. and giv[e] it to B"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (statute cannot merely balance "the private economic interests of coal companies against the private interests of the surface owners"); Laurence H. Tribe, *American Constitutional Law* § 9-2, at 588 (2d ed. 1988) (noting "constitutional law's undisputed condemnation" of law that "take[s] property from A and give[s] it to B").[19]

[18] The court below saw this legislation as an effort to restore "labor peace" by avoiding "wrangling over the provision of health care benefits for retired mine workers." Pet. App. A-12. There is a certain logic to that approach: doubtless one of the easiest ways for labor and management to resolve their differences over benefits is to find, with the help of Congress, a third party to pay for them. As Paul MacAvoy observed, the Coal Act "is unjustifiable because it solves neither a market failure nor a contractual incompleteness problem. The Act was passed to solve an alleged funding crisis which never existed and to fund the benefits of orphan retirees whose health care benefits were already contractually provided for in existing health benefit funds." MacAvoy Statement at 189.

[19] This retroactive legislation is all the more illegitimate because it was specifically targeted to "correct" decisions such as *In re Chateaugay Corp.*, 945 F.2d 1205, which had released coal companies from liability to pay lifetime health benefits to the same retirees that the Coal Act now forces them to pay. To the extent that the Coal Act was premised on the narrow task of reversing these decisions, the Coal Act implicates many of the same concerns about legislative interference with final court judgments that underlay this Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Coal Act, in essence, reopened final judgments precisely because it did not "make general law," *id.* at 224, but instead required transfers between narrow groups based on their contractual promises—"taking property from A and giving it to B"—when courts had already adjudicated that the contracts did not require such transfers between A and B.

While Congress could certainly accomplish the objective of aiding the retiree miners and their dependents who are the Coal Act's beneficiaries—and could probably do so without aiding the millions of other citizens in their advancing years who find themselves without adequate provision for comprehensive medical care—absent pre-existing obligations, it may not simply impose the resulting burden on another group of private entities:

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*[*v. United States*, 364 U.S. 40, 49 (1960)], this is the only manner that our Constitution permits.

Pennell v. City of San Jose, 485 U.S. 1, 21-22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part).[20] The Coal Act singles out pre-1988 Wage Agreement signatories like Eastern to privately fund the solution of problems for which they simply are not responsible. *Cf. Nollan v. California Coastal Comm'n*,

[20] The *Pennell* majority dismissed a takings challenge on ripeness grounds but did not disagree on the merits with Justices Scalia and O'Connor's straightforward application of takings law's bedrock or guiding principle. *See* 485 U.S. at 8-11.

483 U.S. 825, 835 n.4 (1987). The Coal Act thus forces companies like Eastern to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the decision below.

Respectfully submitted,

DONALD B. AYER
(Counsel of Record)
JONATHAN C. ROSE
JAMES E. GAUCH
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Amici Curiae, AlliedSignal, Inc., The LTV Corporation and Bellaire Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF UNITY REAL ESTATE COMPANY, BARNES & TUCKER COMPANY AND MARY HELEN COAL CORPORATION IN SUPPORT OF PETITIONER

DAVID J. LAURENT
MICHAEL D. GLASS
POLITO & SMOCK, P.C.
Four Gateway Center
Suite 400
Pittsburgh, Pennsylvania 15222
(412) 394-3333

ROBERT H. BORK
Counsel of Record
1150 17th Street, NW
Washington, DC 20036
(202) 862-5851

PATRICK M. MCSWEENEY
WILLIAM B. ELLIS
JOHN L. MARSHALL
MCSWEENEY, BURTCH & CRUMP, P.C.
11 South Twelfth Street
Richmond, Virginia 23219
(804) 783-6800

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PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, as applied, violates the Due Process Clause and the Takings Clause of the Fifth Amendment?

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BRIEF *AMICI CURIAE* OF UNITY REAL ESTATE COMPANY, BARNES & TUCKER COMPANY AND MARY HELEN COAL CORPORATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

Two of the *amici*, Barnes and Tucker Company ("B&T") and Mary Helen Coal Corporation ("Mary Helen"), once mined coal under collective bargaining agreements with the United Mine Workers, but ceased doing so long before the enactment of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* (the "Coal Act"). The third *amicus*, Unity Real Estate Company ("Unity"), never engaged in coal mining, but is a "related party" under the Coal Act because of its relationship with companies that years ago mined coal under collective bargaining agreements with the UMWA.

Each of the *amici* will suffer the total loss of all its assets as a consequence of the Coal Act assessments imposed on it based on events that occurred years before the Coal Act became law. They submit this brief to present the Court with a situation the court below specifically distinguished — namely, a complete confiscation of all of a company's assets — and to show that rationality would no longer be an element of taking and due process analysis if the Coal Act is determined to be constitutional.

---

[1] Each of the parties has consented to the filing of this brief. A copy of the letter from each party has been filed with the Clerk of this Court in accordance with Rule 37.3. No person other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6. The brief was not authored in whole or in any part by counsel for a party. Rule 37.6.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Coal Act as applied to Eastern Enterprises ("Eastern") and to the *amici*. The *amici*, like Eastern, either are or were related to companies that ceased to engage in coal mining well before the Coal Act was passed.

Though there are additional factors, the Coal Act works an unconstitutional taking as well as a denial of due process for two primary reasons. The first is that the Act is utterly irrational. It establishes a health plan by which former coal operators must pay benefits for health problems that have nothing whatever to do with mining. The benefits are exacted retroactively from companies that have ceased mining altogether, and did so, in some cases, decades ago. A man may have worked in a union mine for a company two days twenty years ago. The company may have quit mining ten years ago. But, if he is run over by a truck tomorrow, the coal operator must pay his medical expenses, and for the medical expenses of his dependents and survivors. In some cases, the beneficiary has *never* been employed by the assessed entity. No decision of this Court has ever gone so far as to find such a scheme rational. If it were upheld, the rationality element of taking and due process analysis would drop out of the law altogether.

Second, the payments irrationally and retrospectively extracted from mine operators who have left the industry work a severe financial hardship. These *amici*, Unity, B&T and Mary Helen, for example, have not mined coal for years but they will be obliterated, all of their assets completely confiscated, by the payments required of them by the Coal Act. No harsher or more unjust result can be imagined. If this is not

a taking within the meaning of the Fifth Amendment, nothing is.

The history underlying the Coal Act is quite simple.

In 1946, following a strike in the coal industry, President Truman ordered the Secretary of the Interior to seize the coal mines and negotiate changes in the terms and conditions of employment with the United Mine Workers of America (the "Union").

The Secretary and the Union created a multiemployer welfare and retirement fund to provide miners with health benefits funded through payroll deductions. The mines were returned to the operators in 1947. The Union and a committee of the coal operators negotiated the first National Bituminous Coal Wage Agreement (the "1947 Agreement"), which created a new multiemployer union welfare and retirement trust (the "W&R Fund"). Signatory employers of Union miners agreed to pay a fixed royalty only during the life of the 1947 Agreement for every ton of coal produced or sold. The W&R Fund gave the trustees discretion to decide the benefits provided.

A new W&R Fund was established in 1950, under which the coal operators paid set amounts to the Fund, again only during the period of the Agreement they signed. No benefit levels were guaranteed. Beneficiaries were told that benefits were revocable and not vested. The Fund trustees frequently exercised their authority to revise eligibility requirements and to alter, rescind, or reduce particular benefits.

Every court that has addressed the question has concluded that coal operators that permanently ceased mining

bituminous coal were not liable for any retiree health benefits beyond the term of the last agreement they signed.[2] The Trustees conceded the point in *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366 (E.D. Va. 1997). The facts in Mary Helen's case were indistinguishable from those in the case of either of the other two *amici*, B&T and Unity; consequently, the same conclusion should follow in those cases.

This situation remained essentially unchanged for almost a quarter of a century, until the Employee Retirement Income Security Act of 1974 caused the Bituminous Coal Operators Association ("BCOA") and the Union to enter into the 1974 Agreement, which differed substantially from previous agreements. Four new trusts, two of which were benefit plans, succeeded to the 1950 W&R Fund. The new UMWA 1950 Benefit Plan provided health benefits for pre-1976 retirees. The new UMWA 1974 Benefit Plan initially provided health benefits to miners who retired in 1976 or thereafter.

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[2] See *LTV Steel Co. v. UMWA (In Re Chateaugay Corp.)*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992), and cases cited therein. *UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993), *cert. denied*, 509 U.S. 924 (1993), is not to the contrary. This case held that trust documents incorporated into the Agreements included a clause — the so-called evergreen clause — that required employers to continue to contribute at the rates in the new national Agreement, even if it did not sign that Agreement. This obligation, however, applied only to employers that continued to be "engaged in the production of coal," since contributions were based solely on hours worked or tons produced. 984 F.2d at 474 n.5.

In 1978, the BCOA and the Union entered into a new agreement, the first that obligated signatory operators to make higher contributions to the Benefit Plans should that be necessary to guarantee sufficient funds for medical costs incurred during the term of that 1978 Agreement. The 1978 Agreement also required signatory operators to provide retiree medical benefits directly to their own post-1975 retirees, but only during the term of the Agreement. Agreements signed in 1981, 1984, and 1988 also contained similar clauses.

The Coal Act of 1992 extended liability to every coal operator that had ever operated under any Agreement with the Union — that is, any Union agreement from 1946 to 1988. Liability was imposed whether or not the coal operator was still in the industry, had signed any agreement after 1947, or had employed the benefits claimant at all. In fact, the Act imposed liability for the claims of individuals (*e.g.*, dependents) who never worked in a mine nor had any disease or injury that had anything to do with mining.

The consequences are often devastating. As noted, the government has taken or will take *all* of the assets — assets wholly unrelated to mining — of these three *amici*. These companies face extinction.

SUMMARY OF ARGUMENT

The Coal Act, as applied to the petitioner and the *amici*, constitutes an uncompensated taking and a violation of due process. The Court has never upheld a governmental action as extreme as that attempted here. The reach of the Coal Act's retroactivity is unprecedented. The oppressive burden it imposes on former coal operators to fund general health benefits for retired coal miners and their dependents bears no

rational relationship to the coal operators' employment of these beneficiaries. In the case of these *amici*, the effect is to confiscate all of their assets and extinguish them entirely.

If this governmental action is upheld, there would remain no limit on the government's power retroactively to appropriate the assets of some for the benefit of others.

ARGUMENT

The Judgment Below Should Be Reversed Because the Coal Act Takes Petitioner's and *Amici*'s Property for Public Use Without Just Compensation and Deprives Them of Due Process

Four factors are of particular significance in analyzing a taking or due process claim: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct, investment-backed expectations; (3) the character of the governmental action; and (4) the requirement of a rational relationship between what the government does and what its purported purpose is. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-38 (1978); *see also, Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-27 (1976). Of these, the most important factor in the present case is the lack of any rational relationship between the liabilities imposed by the Coal Act and any legitimate purpose.

A. The Coal Act's Retroactive Liability for a Broad Array of Non-Mining-Related Benefits Bears No Rational Relationship to Any Legitimate Governmental Purpose

The Coal Act provides health care payments for all of the health problems of past UMWA miners, their dependents, and their survivors. The health problems covered need have no relationship whatever to any work in the mines. A Union member who worked two hours total for a mine operator in 1950 is entitled to impose his health care costs on that coal operator if he is later run over by a truck. In addition, he may have his dependents' bills paid and, if he dies, his survivors' bills paid.[3] And this obligation of the operators is forced upon them even though they never employed the dependents in question and left the industry long before the government imposed this extraordinary financial obligation upon them.

This governmental action is thus far more irrational in its retroactivity and in other respects than any program this Court has previously examined. Whatever their differences in other respects, both the Due Process Clause and the Taking Clause of the Fifth Amendment require that there be a rational relationship between government action and the purpose intended to be served. That is shown by a comparison of *Usery, supra,* 428 U.S. 1, with this Court's taking decisions. *Usery* involved a due process challenge by coal mine operators

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[3] Although a miner generally had to have worked a minimum number of years to be eligible for benefits from the prior Benefit Plans and W&R Fund, employment with operators that are no longer in business is disregarded under 26 U.S.C. § 9706(b)(1). Therefore, even minimal employment can result in complete responsibility for the health benefits of a miner and his dependents under the Coal Act.

to the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act of 1972 ("BLBA"), which required coal operators to compensate former employees who finished their work in the industry before the BLBA was passed. In upholding a major provision of the statute, the Court said:

> To the extent that the presumption of death due to pneumoconiosis [black lung disease] is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner — by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a `cost' of the operator's business.

428 U.S. at 24-25.

The Court found a rational relation between the business and the presumption of death due to pneumoconiosis, but for reasons wholly absent from the present case. If a miner died with, but not from, pneumoconiosis *before* the BLBA was passed, the benefits were deferred compensation for the suffering endured by his dependents. If such a miner died *after*

the BLBA was passed, the benefits had the additional purpose of letting him know that his dependent survivors would receive benefits. That knowledge compensated him for his suffering.

> In short, [the statute's] presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems . . . .
>
> We might face a more difficult problem in applying [the statute's] presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness.

428 U.S. at 25-26.

But even this extremely tenuous relationship between work as a miner and a particular illness is absent in the present case. Eastern and the *amici* are required to pay huge sums of money on account of miners, dependents, and survivors who had no illness attributable to mining, but had unrelated problems, such as being injured or killed in a motor accident.

There is *no* rational relationship between mining and most, if not all, of the health payments made. That a former employee is hit by a truck is not a cost of the coal operator's doing business, and paying to have a cast put on the man's leg does not "spread costs in a rational manner." This provision of the Coal Act is equivalent to Medicare and Medicaid — except that the cost must be paid by mine operators who had no more to do with the injury or illness than any other taxpayer.

The only connection between an operator and the beneficiary — prior employment of a member of the beneficiary's family — is an arbitrary basis upon which to rest retroactive liability of the sort imposed here. First, as explained above, the employment itself did not cause any harm or injury. Second, there is no sensible correlation between the employment and the liability imposed; the liability is the same regardless of whether the operator employed the miner for one day, one year, or thirty years, and takes no account of whether a miner's dependents were even alive during the miner's employment.[4]

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[4] For example, Eastern's liability for a miner who has two dependents, but who worked only one day for it, is exactly the same as its liability for a miner who also has two dependents, but who worked for it for twenty years. Indeed, Eastern's liability for a miner who worked for it for one day and has two dependents may actually be greater than its liability for a miner who has no dependents, but who worked for it for 40 years. Thus, there is absolutely no proportionality whatsoever between the liability imposed and the operator's prior employment of the miners on which that liability is based. As of December 31, 1996, more than 72% of the Combined Fund's beneficiaries never worked in any coal mine for any employer. Instead, they are spouses and dependents of former mine workers. Thus, whatever the health care needs of the overwhelming majority of the beneficiaries may be, they certainly

Moreover, the cases upholding the constitutionality of retroactive legislation do so on the basis that some past "wrong" requires present corrective action. This is true of both the Black Lung and the CERCLA cases. In each, there had been a past event — exposure of workers to coal dust or contamination of the environment with long-lasting hazardous waste — that may not have been known at the time to be injurious, but came to be recognized as such with advancements in science and technology. When Congress acted in those instances, it did so to remedy the present negative consequences of past wrongful conduct. Similarly, when Congress enacted the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 ("MPPAA"), it did so to correct a deficiency in its earlier legislation regulating pension plans, which actually created an undesirable incentive for employers to withdraw from multi-employer plans. When Congress acted to correct its own inadvertence, it imposed only a short period of retroactivity to foreclose additional hasty withdrawals during the legislative process. In the cases of Eastern and the *amici*, however, there is no past "wrong" whatever to justify an extraordinarily long retroactivity.

The requirement of a rational connection is the crux of this Court's leading taking cases: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-41 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386-91 (1994).

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bear no connection at all to employment with Eastern or these *amici*, or with any other former signatory. Nevertheless, Eastern or these *amici* bear the full cost of health benefit premiums for every non-employee beneficiary assigned to them.

In *Nollan*, the Commission gave permission for the Nollans to rebuild and enlarge a house on their beachfront property upon condition that the Nollans transfer to the public a lateral easement along the beach to connect two pieces of public beach. The Commission stated that this condition promoted the legitimate state interest of diminishing the blockage of the public's view of the ocean caused by the new construction. In ruling for the Nollans, this Court noted that a permanent physical occupation of the beach had occurred, but also ruled that there was no nexus between the condition imposed and the government's purported goal. There was no relationship between the public's ability to see the ocean from the road and the easement over the beach.

Dolan displayed a greater correspondence between the government's goal and the condition it sought to impose, but this Court ruled that a taking had occurred nonetheless. Dolan sought a permit to increase the size of her store. In return, the city demanded that she dedicate part of her property for flood control and improvement of the drainage system and another part, a 15-foot strip, for a public pedestrian and bicycle path. The Court first asked "whether the `essential nexus' exists between the `legitimate state interest' and the permit condition exacted by the city." 512 U.S. at 386. The Court said that a "rough proportionality" was necessary. While the law already required that Dolan leave 15% of her lot as open space, the city wanted her property, but had never said why public rather than private ownership was relevant to flood control. The same defect vitiated the city's demand for the dedication of land for a recreational pathway: there was no showing that the additional number of trips generated by Dolan's development would reasonably relate to a pathway easement.

These cases make it undeniable that the government's appropriation of property for itself or for others must bear at least a rough proportionality to a legitimate state interest. The government has not made, and cannot make, that showing with respect to the Coal Act's retrospective imposition of liability upon coal companies to pay for all of the assorted health problems a former miner, or his dependents and survivors, might encounter. Since there is no requirement that the health problems be related to work in a mine, the situation is no different than if Congress passed a statute making liable existing and former law firms for the health care of all persons, their dependents and survivors, who had ever worked in any capacity in any law firm. There is no rational connection between the liability and the health problems. If there need be no relationship between employment and an employee's illness, Congress could with equal validity make all present and former law firms liable for the health care of all former farmers, their dependents and their survivors. In this respect, the Coal Act's only rationale is the desire to benefit one group at the expense of another, although no relationship exists between the second group's problems and the first group's conduct.

The length of the period of retroactivity here is without precedent. The irrationality of the Coal Act's retrospective reach cannot be cured by arguing that it merely codifies the contractual obligations already existing between miners and the former coal operators. This is not a contract case. If it were, this Court would never have agreed to hear it.[5] More to the point, each Agreement between the Union and the BCOA

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[5] Indeed, if such a contractual obligation had existed, then there would have been no need for the Congress to enact the Coal Act.

explicitly stated that the obligation of the coal operators to fund health benefits ended with the termination of the Agreement.

For this reason, miners could not have developed reasonable expectations of lifetime health care on the basis of any of the Agreements, particularly from operators that left the industry and were no longer signatory to any such Agreements long before the Coal Act was even considered by Congress. The only reasonable expectation the miners could have had was that those operators who remained in the industry and continued to sign Agreements would pay for their benefits as part of the quid pro quo for the services the operators received from their current employees. That was what the miners had experienced for the past fifty years, and that is what had been found by every court to have considered the issue.[6] Indeed, although the Court upheld the imposition of retrospective liability in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *Usery, supra*, 428 U.S. 1, neither of the statutes involved in those cases imposed liability on employers that withdrew from the plan or industry well before the respective statutes were passed. MPPAA did not impose any liability on employers who withdrew prior to the time the act was first being considered, *Gray*, 467 U.S. at 730-31, and the BLBA did not impose any liability on employers who did not continue to operate coal mines after a specified post-enactment date (June 30, 1973), 30 U.S.C. § 932(a) and 20 C.F.R. § 725.492(a)(2).

Nor can it be said that petitioner and the *amici* contributed to the Fund's financial problems by withdrawing from the industry. Eastern and these *amici* had fully paid their obligations under all Agreements and statutes in effect at the

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[6] *See* footnote 2, *supra*.

time they ceased mining coal and left the industry. The district court in amicus Mary Helen's case said that "Congress has merely enacted legislation to ensure the continuation of health benefit programs from which many operators, including Mary Helen, try to walk away." *Mary Helen Coal Corp., supra,* 976 F. Supp. at 374. The argument erroneously assumes that one can walk away from an "obligation" that does not exist.

The district court's implicit rationale is that: (1) no operator can leave the industry, no matter how unprofitable its operations, and no matter that it has no further contractual or statutory obligations to pay benefits; (2) once the BCOA makes an Agreement with the Union, however limited in its terms it may be, all signatory operators are required to stay in the industry and keep accepting future Agreements even if they are no longer mining coal and could not do so profitably, or, indeed, even if they have no coal to mine; and (3) otherwise, they will be held responsible for any shortfall in benefits. Any such rule would amount to a new form of involuntary economic servitude. That is an erosion taking and it is forbidden. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 122-25 (1974); *Railroad Comm'n of Texas v. Eastern Texas R.R. Comm'n*, 264 U.S. 79, 85 (1924); *Bullock v. Florida*, 254 U.S. 513, 520-21 (1921); *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 398-99 (1920).

Justice Holmes' opinion for the Court in *Brooks-Scanlon*, answering the argument that a money-losing railroad could be compelled to continue in business if other business of the corporation allowed the combined enterprise to show a profit, might have been written for petitioner and the *amici* here: "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." 251 U.S. at 399.

B. The Character of the Governmental Action Is the Permanent Appropriation of the Funds and Assets of Petitioner and the *Amici* by the Imposition of Retroactive Liability for Problems Not of the Companies' Making

There is no conceivable argument, much less a rational one, that petitioner and the *amici* somehow created diseases and injuries that are in no way related to mining. Yet, the government would commandeer the companies' funds and assets — and in the case of these *amici*, all of their funds and assets — to pay the costs of such diseases and injuries.

The Coal Act requires that these *amici* sell off all of their assets and be left with nothing in order to pay the obligations retroactively imposed upon them. When their assets are entirely exhausted, these companies will still owe great sums. The patent injustice and novelty of that result is no doubt one reason this Court has not yet had to face the question whether the government may retroactively take *all* of a firm's assets. *See, e.g., Concrete Pipe and Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 643-45 (1993). That is why the taking of all the assets of each of these *amici* distinguishes this case from *Concrete Pipe*. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (government action that results in deprivation of all economically beneficial or productive use of property is a categorical taking). This is an additional reason why these *amici* should be relieved by constitutional mandate from the draconian retroactivity of the Coal Act.

C. The Adverse Economic Impact and Interference with Investment-Backed Expectations of the Coal Act upon the Petitioner and the *Amici* Is Enormous

The impact on each of these three *amici* is total and devastating.

Unity is a small company that owns and leases space in an office building and a parking lot. Unity was never directly involved with the coal industry. Its liability under the Coal Act arises as a "related person" to two entities — a company that ceased its coal industry operations in 1960 and was merged into Unity in 1969, and a subsidiary formed in 1974 that was liquidated in bankruptcy in 1981. Unity's total assets when the Coal Act became law in 1992 — the small commercial building and adjacent parking lot mentioned above — are worth approximately $85,000.00, and generate total annual revenues of only $50,000.00. From these revenues, Unity must pay the salary of one employee, maintenance costs, and real estate and other taxes, prior to any return to stockholders. Nevertheless, Unity's Coal Act liabilities for the first full Plan year alone exceeded $266,000.00. Unity has not made, and cannot make, any of the onerous payments required by the Coal Act, and its liabilities — $771,443.30 as of November 25, 1997 — will continue to grow at the rate of $12,568.97 per month, with no end in sight short of surrendering to the Trustees everything it owns.

In 1986, B&T permanently ceased mining and selling coal and five individuals purchased its stock. At that time, B&T was adequately capitalized to provide indefinitely for the payment of more than $25,000,000 to hundreds of workers' compensation and black lung claimants, and to pump and treat

more than 10 million gallons of acid mine discharge daily, and to provide its shareholders a return on their investment. B&T's Coal Act liabilities, however, far exceed its assets. Its assets are being totally consumed to make the onerous payments demanded by the Coal Act. B&T's Coal Act liabilities – it has paid a total of $12,619,327.00 through November, 1997, and is continuing to pay at a rate of $2,626,212.00 per year (which exceeds its annual gross revenue by more than 100%) – will consume the totality of its remaining assets in less than two years, leaving it unable to provide for its pre-Coal Act employee-related and environmental liabilities. Thus, B&T will shortly lose everything it owns to the Trustees.

Mary Helen began mining in 1921, but heavy operating losses due in major part to increasing labor costs caused it to lease or assign all of its mineral rights and to sell all of its mining equipment to an unrelated third party in 1963. Mary Helen then derived most of its revenues from royalties paid by its lessee, but in 1995 the lessee stopped royalty payments because no more coal could profitably be extracted from Mary Helen's land. The total market value of Mary Helen's assets, including land, approximates $1,650,000. In 1997, the Trustees obtained a judgment of $895,357.81 against Mary Helen for past due Coal Act assessments. The monthly assessment was then $49,234.66. Meeting it would require the company to earn 67% or more on its assets, without regard to other expenses. That is a plain impossibility, and Mary Helen will exhaust its real and personal property in a matter of months.

These three companies are suffering an unconstitutional taking under any test. The government's action here certainly does not pass the "just and reasonable" test of *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope* teaches that after the government has acted:

> [I]t is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock . . . . By that standard the return to the equity owners should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and to attract capital.[7]

Clearly, the just and reasonable test is not met as to the three *amici* who will lose all of their assets by operation of the Coal Act.

Eastern, while it does not face imminent insolvency, is otherwise in the same position as the three *amici* just discussed. The Coal Act's economic impact upon it and the defeat of its investment-backed expectations has been and will be severe, and its investment-backed expectations will be drastically damaged without rational justification.

The financial prospects for affected companies can only get increasingly worse. The burden created by the Coal Act

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[7] *Id.* at 603. *Hope* involved the construction of a federal statute, but also a due process challenge. The Court concluded that the constitutional requirements were no more exacting than the statutory requirements; consequently, conformance by the government with the statute means that it "does not run afoul of the [Due Process Clause]." *Id.* at 607. *See Dusquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (noting the constitutional dimension of *Hope*).

will undoubtedly drive many smaller companies out of business and appropriate all of their assets. This will increase the number of unassigned miners and dependents whose lifetime benefits for non-mine-related injuries and diseases must be paid by a decreasing number of operators. More companies will then have all of their assets taken.

* * * * * * * *

No decision of the Court upholds a governmental appropriation of private property as extreme as that the government attempts here. All of the factors that guide takings and due process analysis under the Fifth Amendment demonstrate the constitutional invalidity of the Coal Act's retrospective sweep here. If there remain any limits to the government's power retroactively to appropriate the assets of some for the benefit of others, this case easily surpasses those limits.

CONCLUSION

The Coal Act as applied to Eastern and to the *amici* violates both the Takings Clause and the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

DAVID J. LAURENT
MICHAEL D. GLASS
Polito & Smock, P.C.
Four Gateway Center, Suite 400
Pittsburgh, Pennsylvania 15222
(412) 394-3333

ROBERT H. BORK
(Counsel of Record)
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5851

PATRICK M. MCSWEENEY
WILLIAM B. ELLIS
JOHN L. MARSHALL
McSweeney, Burtch & Crump, P.C.
11 South Twelfth Street
Richmond, Virginia 23219
(804) 783-6800

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE FOR THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY W. SARLES
KASPAR J. STOFFELMAYR
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(317) 782-0600

December 11, 1997

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QUESTIONS PRESENTED

Amicus Washington Legal Foundation addresses the following questions:

1. Whether assessments under the Coal Act, which require Eastern to bear substantial costs to address a benefit shortfall to which it has not contributed, are a compensable taking.

2. Whether due process is violated by retroactive legislation that imposes massive costs on Eastern based on conduct that occurred decades earlier, absent a showing that there is a direct and proportionate causal link between Eastern's conduct and the harm addressed by the legislation.

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General Motors Corp. v. *Romein*, 503 U.S. 181 (1992) 19

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Jeremy Bentham, *The Theory of Legislation* (C.K. Ogden ed., 1931) 13

James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992) 17

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 17

The Federalist No. 54 (James Madison) (Clinton Rossiter ed., 1961) 17

Jan G. Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997) 8

Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329 (1995) 18

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165 (1967) 14

Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (1990) 17

Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941 17

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EASTERN ENTERPRISES,
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On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF AMICUS CURIAE FOR THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF THE AMICUS[1]

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF devotes

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[1] Pursuant to Supreme Court Rule 37.6, amicus represents that no counsel for either party authored this brief amicus curiae, either in whole or part. Furthermore, no persons or entities other than amicus curiae, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

substantial resources promoting private property rights and due process for businesses by publishing on these subjects through WLF's Legal Studies Division and by participating in related litigation. WLF has appeared as amicus curiae in a number of cases challenging the constitutionality of legislation under the Due Process and Takings Clauses of the Fifth Amendment which are relevant to this case. *See, e.g.*, *United States* v. *Carlton*, 512 U.S. 26 (1994); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Ehrlich* v. *City of Culver City*, 50 Cal. Rptr. 2d 242 (Sup. Ct.), cert. denied, 117 S. Ct. 299 (1996); *Golden Gate Hotel Ass'n* v. *San Francisco*, 864 F. Supp. 917 (N.D. Cal. 1993), vacated, 18 F.3d 1482 (9th Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994); and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

WLF believes that it can bring a broader perspective to this case than the parties and that its brief will complement the brief of the petitioner and be of material assistance to this Court in deciding the issues in this case. The consents of the parties to the filing of this brief have been filed with the Clerk.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the Petitioner's brief. In brief, Eastern Enterprises ("Eastern") has not mined coal since 1965, when it transferred its coal business to an independent, fully-capitalized subsidiary. Eastern has not signed a coal wage agreement since that time. None of the wage agreements to which Eastern was signatory guaranteed lifetime health benefits for enrolled miners and their families.

Beginning years after Eastern left the coal mining industry, other members of the industry promised lifetime health benefits. As it turned out, they could not live up to

those promises. Nearly three decades after Eastern left the coal mining business, Congress told Eastern that it must step in and make good the promises of lifetime benefits made by *other* companies. Pursuant to the apportionment scheme Congress adopted in the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706 (the "Coal Act"), Eastern has already been assessed over $5 million—and has a projected total liability in excess of $100 million—to cover the health care expenses of some 1,400 coal miner retirees and their beneficiaries.

SUMMARY OF ARGUMENT

Retroactively forcing Eastern to bear these massive costs, absent any showing of a real causal nexus between Eastern's conduct and the harm addressed by the Coal Act, violates both the Takings Clause and the Due Process Clause of the Fifth Amendment.

This Court's Takings Clause jurisprudence firmly establishes that a government-imposed forfeiture of private property rights, for the purpose of providing a benefit to the public at large or to a politically favored group, would constitute a compensable taking if the burdened property owner neither caused nor contributed to the conditions that gave rise to the need for the benefit. The record here establishes that Eastern was in no way responsible, directly or indirectly, either for the promises of lifetime benefits made to coal workers long after Easter left the industry or for the benefits shortfall that led Congress to enact the Coal Act. Given the lack of any causal nexus, the huge size of the assessments, and Eastern's reasonable expectations when it left the coal industry that it would not be required to fund later-promised retirement benefits, the Coal Act assessments amount to a taking.

The Due Process Clause requires heightened rationality review (at least) where—as in this case—retroactive

legislation overturns settled expectations and interferes with rights to private property. To survive searching rationality review, there must be a causal relationship between the conduct of the burdened party and the problem addressed by the governmental action. Because there is no causal connection here, the Coal Act assessments against Eastern violate due process.

ARGUMENT

I. REQUIRING EASTERN TO PAY MILLIONS OF DOLLARS TO MEET A BENEFIT SHORTFALL FOR WHICH IT BEARS NO RESPONSIBILITY IS A COMPENSABLE TAKING

The Takings Clause prohibits the government from taking private property for public use without the payment of just compensation, and thus "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Amazingly, the court of appeals dismissed the text of the Takings Clause and the much-cited *Armstrong* gloss as "rhetorical flourishes." It shrugged off the government's exaction of $100 million from Eastern to cure a benefit shortfall for which Eastern is in no way responsible as an unremarkable readjustment of economic burdens. Pet. App. 19. But this Court has rejected the notion that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). The Framers wrote the Takings Clause not as a "rhetorical flourish" but to guard against the very type of oppressive governmental conduct that Eastern challenges here. However laudable the goal of ensuring health benefits for coal retirees, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the

change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922).

A. It Is A Taking To Require Eastern To Pay Huge Sums To Solve The Problem Of Funding Coal Retiree Health Benefits, Where Eastern Neither Caused Nor Contributed To That Problem

The Takings Clause is a safeguard against governmental appropriation of the property of private parties to benefit society as a whole or other private parties that the government favors. The Takings Clause does not prevent governmental regulation, but subjects it "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). Thus, a primary exception to the availability of compensation for regulatory takings—dictated by "justice and fairness"—is where the owner's use of his property has caused or contributed to the social problem at which the regulation is directed. The Court's recent cases establish that this causation principle is fundamental to takings analysis.

In *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), lack of causation was central to this Court's holding that the state took private property when it conditioned the grant of a building permit on homeowners' willingness to cede a lateral easement across their beachfront lot. The lack of any nexus between the easement and the problems that might result from the proposed construction transformed what otherwise might be permissible land use regulation into an unconstitutional taking. The Court found it "impossible to understand" how the state's condition would remedy any of the problems that the state alleged would be "*caused by* construction of the Nollans' new house." *Id.* at 838-839 (emphasis added). Further, the Court noted, the state's action likely would violate the Takings Clause "[i]f the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not

contributed to it more than other coastal landowners." *Id.* at 835-836 n.4.

In other words, the larger house with which the Nollans proposed to replace their small bungalow would not cause or exacerbate the problem that the state sought to remedy —inadequate lateral beach access. Poor lateral access may well have been a real problem, but it was caused by other factors, such as historical zoning patterns and the fact that so many visitors wished to enjoy a limited resource. The Nollans' proposed new house could not possibly affect the difficulties of lateral access experienced by people already walking along the public beach behind their house. Perhaps it would prove an obstacle for people driving along the street in front of the Nollans' house, but the state's imposed easement would not have remedied that problem. In sum, the fact that the Nollans were not responsible for the harm the state sought to remedy played a significant part in the Court's ruling that they were entitled to just compensation.

This Court elaborated on the integral role that causation plays in takings analysis in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* emphasized the importance of state nuisance law—which focuses on the public harm *caused by* the use of private property—in determining whether a property owner constitutionally must be compensated for a regulatory invasion of his property rights. *Id.* at 1029-1031 (application of state nuisance law entails analysis of the harm "posed by the claimant's proposed activities"). The Court recognized that government may impose burdens on property if the owner's use of the property *causes* severe burdens to others. The Court illustrated this point by explaining that (i) denial of a landfill permit to the owner of a lake-bed would not be a taking where the landfill would cause flooding of others' land, and (ii) an order to a nuclear plant owner to remove improvements upon discovery that the plant sits astride an earthquake

fault would not be a taking because the position of the improvements *contributed to* a threat of great public harm. *Ibid.*

Dolan v. *City of Tigard* reinforces the teaching of *Nollan* and *Lucas* that absent a causal link between the owner's use of the property and the challenged governmental action, the owner of burdened property has a claim for just compensation. In *Dolan*, the city conditioned its approval of Mrs. Dolan's proposal to expand her hardware store on her dedication of part of her property for a greenway that would improve flood and traffic control. Lack of any demonstrated causal connection between Mrs. Dolan's planned use of her property and the government's regulatory purpose was the dominant factor in this Court's ruling that Tigard may have taken Mrs. Dolan's property.

First, the Court explained, the government may not condition issuance of a building permit on the owner's dedication of property without compensating the owner "where the property sought has little or no relationship to the benefit." 512 U.S. at 385. Second, there must be an "essential nexus" between the public use and the government's action. *Id.* at 386. Third, there must be a "rough proportionality" in nature and extent between the exaction on the property owner and "the impact of the proposed development." *Id.* at 391. Applying these principles, the Court agreed with Mrs. Dolan that the city had not met its burden to quantify the burdens "*created by* her new store" or "the required reasonable *relationship*" that would justify the required dedication. *Id.* at 386, 394-395 (emphasis added). The Court emphasized this point by noting that there would have been no taking if Mrs. Dolan's expansion were the cause of the city's shortage of greenway space: "If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative

greenway space for the public either on her property or elsewhere." *Id.* at 394.

These cases establish that a government-imposed forfeiture of an owner's property rights for the purpose of providing a benefit to society at large or to a favored group may be a taking if the property owner did not cause or contribute to the need for the benefit. See also *Pennell* v. *City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting) (requiring "a cause-and-effect relationship" between the governmental imposition and "the social evil" it sought to remedy; where "the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly"); see generally Jan G. Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997).

This principle explains why Eastern's case is distinct from the Court's withdrawal liability cases relied on by the court of appeals. In *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), it was the employers' conduct—their withdrawal from multiemployer pension funds—that triggered the challenged applications of the Multiemployer Pension Plan Amendments Act and thus *caused* the harm that the statute sought to correct. Because the employers had contributed to the problem addressed by the imposed liability—the rescuing of troubled pension plans—the "fairness and justice" principle articulated in *Armstrong* did not require the public as a whole to shoulder the responsibility of curing it. See *Connolly*, 475 U.S. at 227. In contrast, imposition of retroactive liability on parties that had never agreed to ensure full funding of benefits, "without regard to the extent of a particular employer's *actual responsibility*," would have been a taking. *Id.* at 230-231 (O'Connor, J., concurring) (emphasis added).

Unlike the First Circuit in this case, many lower courts, especially recently, have adhered to the Court's requirement of a causal relationship between the social harm sought to be remedied and the government imposition on property rights. *E.g.*, *Aladdin, Inc.* v. *Black Hawk County*, 562 N.W.2d 608, 615 (Iowa 1997) (requiring a landowner to pay for environmental cleanup costs before it is determined whether the landowner is responsible for the contamination is a taking without just compensation); *Ehrlich* v. *City of Culver City*, 50 Cal. Rptr. 2d 242, 261 (Sup. Ct.) (imposition of an impact fee may be a taking where there is an insufficient link between the fee and the problem caused by the burdened development), cert. denied, 117 S. Ct. 299 (1996); *Manocherian* v. *Lenox Hill Hosp.*, 618 N.Y.S.2d 857, 862-863 (Ct. App. 1994) (a statutory requirement that property owners renew the leases of nonprivate hospitals, where the owners did not cause the social harm addressed by the statute, was a taking), cert. denied, 514 U.S. 1109 (1995). And courts have found it constitutionally impermissible to target particular property owners to resolve the problems of low-income persons who cannot afford basic necessities, such as housing or medical care, where the owners did not cause or contribute to those problems. *E.g.*, *Aspen-Tarpon Springs Ltd. Partnership* v. *Stuart*, 635 So. 2d 61, 68 (Fla. App. 1994) (mobile park owners may not be required to buy homes for tenants or pay relocation costs where owners did not cause tenants' difficulties in finding suitable housing); *Golden Gate Hotel Ass'n* v. *San Francisco*, 864 F. Supp. 917, 927-928 (N.D. Cal. 1993) (requiring hotel owners to provide relocation assistance for displaced tenants was a taking because owners were not responsible for social ills of the homeless), vacated on other grounds, 18 F.3d 1482 (9th Cir. 1994).

In this case, the record is clear that Eastern did not cause, contribute to, or have any impact on the current funding problems plaguing the retiree benefit plans. To the

contrary, by establishing, upon its exit from the coal industry, an independent, fully-capitalized company—a company that subsequently met all its obligations to contribute to mineworker benefit funds—Eastern's actions, if anything, delayed the onset of the later crisis.

Nevertheless, the court of appeals fabricated causal threads where none exist. First, the court opined that Eastern "made an implicit commitment" to furnish lifetime retiree benefits by signing wage benefit agreements and making benefit contributions until the mid-1960s. Pet. App. 14. But those agreements did not guarantee lifetime benefits and, indeed, did not even guarantee any particular level of benefits for active miners. And Eastern's contributions never were attached to any promise, explicit or implicit, to provide lifetime benefits. Second, the court of appeals maintained that Eastern's contributions created "an expectation of lifetime health benefits" among miners, without which the pre-Coal Act method of funding benefits might not have been deemed inadequate. Pet. App. 22. But even if Eastern had contributed to such an expectation (and it is impossible to see how it could have done so given the limited nature of its promises), it makes no sense to blame the later funding crisis—lack of money to pay the retirees' medical bills—on what may subjectively have been in the retirees' minds. The court of appeals' attempt to find a causal link between Eastern's conduct and the retiree benefits funding crisis is unavailing.

B. The Three-Factor Analysis Used In Non-Categorical Takings Cases Shows That There Has Been A Taking

Although the lack of a causal relationship between the problem addressed by a government imposition and the conduct of the burdened party is a strong indicator that a taking has occurred, we do not suggest that this by itself is sufficient to establish a taking. Even absent a causal

connection, a government imposition may not be a taking if it is *de minimis* in economic impact, if it does not interfere with the burdened party's reasonable investment-backed expectations, or if the nature of the governmental action renders it constitutionally unproblematic (for example, because the imposition is a broad-based tax). See *Babbitt* v. *Youpee*, 117 S. Ct. 727, 731 (1997). None of these three factors assists respondents; each weighs in Eastern's favor.

Economic Impact. The $5 million already assessed against Eastern, and the $100 million-plus liability that Eastern faces in the future are, by any token, significant sums. See *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987) (taking of property interests valued at under $2,000 may have "substantial" economic impact because "[t]hese are not trivial sums"); *Youpee*, 117 S. Ct. at 733 (taking of property interest of $1,239 is enough to be "palpable"). Yet, the court of appeals found that this factor weighed against Eastern because its liability is "roughly proportionate to the expectation of health benefits that it created" and it has not suffered "the total deprivation of an asset." Pet. App. 20-21.

As demonstrated above, Eastern neither created nor contributed to any expectation that it would subsidize lifetime health benefits after it exited the coal industry in 1965, so there is not even the roughest proportionality between its liability and the purported expectation. And the Court's non-categorical takings test does not require an economic impact that *totally* deprives the owner of its property. See *Lucas*, 505 U.S. at 1019 n.8 (property owner who suffers less than total deprivation of property interest may have suffered a taking); *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). Especially in light of its unexpectedness, the $100 million liability facing Eastern is of constitutional proportions.

Reasonable Expectations. Eastern had every reason to expect that it was free of any coal retiree liability when it left the coal industry. It never had been party to a wage agreement that promised lifetime benefits to retirees, and it transferred all its coal operations and liabilities to an independent company, which has met and continues to meet all its legal obligations to retirees. In those circumstances, the fact that Eastern once employed coal miners gave it no reason to expect that it would be summoned to fund their retiree health benefits many decades later. Certainly, this Court would be surprised if a federal agency suddenly required it to fund lifetime health benefits for attorneys who were Supreme Court clerks decades ago, on the ground that the law firms they subsequently worked for no longer exist. Eastern reasonably expected no comparable liability to descend upon it.

The court of appeals, however, ruled that, because of the federal government's historical regulation of the mining industry, Eastern reasonably should have expected to provide lifetime health benefits for miners it long ago employed. Pet. App. 22. But that paints too broadly. The *general possibility* that Congress might at some point revise the means of funding coal retirees' health benefits is a far cry from the *specific expectation* that Congress would impose vast funding liability on a company that had long been out of the coal business and that never had committed itself to providing lifetime benefits. See *Preseault* v. *United States*, 100 F.3d 1525, 1537-1540 (Fed. Cir. 1996).

That distinction firmly separates this case from *Concrete Pipe*, on which the court below so heavily relied. The plaintiff employer in *Concrete Pipe* had joined the benefits plan *after* Congress made withdrawing employers liable for significant unfunded benefits and thus reasonably should have expected that it might be made liable for greater unfunded benefits. 508 U.S. at 645; see also *id.* at 649 (O'Connor, J.,

concurring) (noting that the Court did not decide whether an employer that joined a benefits plan *before* employers became subject to such liability would have "a strong constitutional challenge to retroactive withdrawal liability"). Eastern never provided coal retiree health benefits during any period when ex-employers could be made liable for lifetime benefits. Thus, unlike the employer in *Concrete Pipe*, Eastern had *no* notice and *no* expectation that the regulatory regime would change so dramatically and impose significant retroactive liability on long-gone employers.

The court of appeals' application of the "reasonable expectations" factor would permit the government to take an untrammeled and unbounded free shot at property owners who had ever been subject to governmental regulation. Indeed, there is no principled way to limit the long arm of this principle to the regulatory environment. *All* property owners know that Congress may change the law at any time. Does that mean that a retroactively applied imposition *cannot* amount to a compensable taking simply because all property owners are on notice that the law might change? If so, the concept of "reasonable expectations" will have been nullified, and the absence of a reliable legal framework will permit rent-seeking and lobbying to displace rational and democratic decisionmaking in our economy and polity. See 2 John Austin, *Lectures on Jurisprudence* § 1128, at 256-257 (Robert Campbell ed., 1875) ("whenever expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession * * * [is] pernicious"); Jeremy Bentham, *The Theory of Legislation* 111-112 (C.K. Ogden ed., 1931) (security in property consists of "receiving no check, no derangement to the expectation founded on the laws").

The societal costs of overthrowing the reasonable expectations of companies like Eastern are heavy. As

commentators have observed, property owners suffer "demoralization" when the government takes their property and hands it over to others—especially where the owners did not cause or contribute to the social problem targeted by the regulation. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1214 (1967). In such circumstances, property owners predictably will resist unfair government exactions, as this litigation attests, imposing significant costs on society as resources are diverted from investment and production into litigation and lobbying. And the court of appeals' obliteration of the reasonable expectations factor can only encourage strategic behavior among potential beneficiaries. In this case, the unions failed to secure lifetime health benefits at the time Eastern was party to the early coal wage agreements. Permitting the unions to secure those benefits from Eastern now through an after-the-fact governmental edict is bound to encourage others to seek desired benefits by relying on governmental largesse as opposed to their own initiative.

Nature of the Governmental Action. The court of appeals found that this factor weighed against Eastern because the $100 million exaction was not a physical invasion or permanent appropriation, but "merely a public program that readjusts economic burdens." Pet. App. 23. In addition, the court below found it significant that the funds to be paid by Eastern go to a private benefit fund, not to a government entity. *Ibid*. However, the Takings Clause is not limited "to outright acquisitions by the government for itself," but also extends to situations where "the Government has simply imposed a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982); see also *Lucas*, 505 U.S. at 1014 (rejecting outmoded notion that the Takings Clause reaches only a "direct appropriation" of property). And a public

program that readjusts economic burdens may be a taking if, as in this case, it "goes too far" and amounts to "a forced contribution" that "is not reasonably related" to the public purpose that the government asserts as its rationalization. *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155, 163 (1980).

Indeed, the governmental action in this case—imposing a $100 million charge on Eastern to cure a benefit shortfall that Eastern did nothing to produce—is truly extraordinary. Eastern, unlike so many other companies, did not orphan its miners when it exited the industry in the mid-1960s, instead establishing an independent corporation to continue mining coal and providing appropriate health benefits to its employees and retirees. And Eastern fully paid for the benefits it derived from the labor of its former employees decades ago, so that exacting additional payments now clearly is gratuitous and punitive. Yet, according to the government, this "good citizen" must pay for the misdeeds of others. This extraordinary conclusion further supports Eastern's takings claims. See *Irving*, 481 U.S. at 716 (finding a taking in part because the nature of the governmental action was "extraordinary"); *Youpee*, 117 S. Ct. at 733 (same).

Finally, this is not a situation where the choice is between making Eastern pay or allowing mine retirees and their dependents to suffer. Assuming the benefits are to be maintained, the real issue is whether Eastern and other super-reachback companies or the public at large should bear the cost of funding them. Eastern may not constitutionally be singled out to shoulder an effort to rescue the troubled health plans. If Congress wants those plans funded, Congress should appropriate the means to do so, not arbitrarily force such funding on Eastern. Reversing the decision below will permit the Takings Clause to continue to"stan[d] as a shield

against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

II. THE DUE PROCESS CLAUSE FORBIDS CONGRESS FROM REQUIRING EASTERN TO MAKE GOOD A BENEFIT SHORTFALL TO WHICH IT DID NOT CONTRIBUTE

The utterly toothless rationality review to which the First Circuit subjected the Coal Act's impositions on Eastern did not satisfy the demands of the Due Process Clause. There are two established principles at work in this case that mandate a harder look at ends and means that the Coal Act assessments against Eastern cannot possibly survive.

The first principle is that a central concern of the Due Process Clause is the protection of rights in private property. Judicial review of economic legislation thus may not be servile or perfunctory, as it was below. The second principle is that retroactive legislation imposes special burdens on affected parties and so requires stronger justification than prospective legislation. Fitting respect for these principles requires a heightened standard of review when government infringes property rights on the basis of conduct that occurred in the distant past. In such circumstances, the Due Process Clause at least demands that there be a direct causal link between the burdened parties' conduct and the problem addressed by the government imposition, and (where there is such a causal link) that the burdened parties' causal contribution be proportionate to the liability imposed. In this case, no such defense can be made of the massive retroactive benefits liability imposed on Eastern. There simply is no causal connection between Eastern's conduct prior to 1966 and the harm addressed by the Coal Act assessments.

A. The Due Process Clause Requires Meaningful Review Of Economic Legislation

Property rights were central to the Framers' understanding of the liberties secured by the Constitution: they supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990); see also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42-58 (1992). The Framers saw the protection of property rights as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (Clinton Rossiter ed., 1961). They recognized, in the words of John Adams, that "[p]roperty must be secured or liberty cannot exist." *Discourses on Davila*, quoted in Ely, *supra*, at 43. Knowing that "[g]overnment is instituted no less for protection of the property than of the persons of individuals" (*The Federalist No. 54*, *supra*, at 339 (James Madison)), the Framers deliberately sought, in the Due Process Clause, to shield interests in property—no less than in life and liberty—from government intrusion. See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 946.

This Court, too, has long recognized that the protection of property rights is "a vital principle of republican institutions." *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 235-236 (1897). Finding that "the dichotomy between personal liberties and property rights is a false one," the Court has confirmed that "rights in property are basic civil rights." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Rights in property are not secondary to rights to liberty because, as the Court explained in *Lynch*, there is a "fundamental interdependence * * * between" them and "[n]either could have meaning without the other." *Ibid.*

The court of appeals brushed aside petitioner's due process challenge to the Coal Act by labeling the Act "purely

economic" legislation that "does not abridge fundamental rights." Pet. App. 10. But property rights clearly are "fundamental" within the ordinary meaning of that term. See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 415 (1995) ("[E]conomic rights are fundamental in terms of the importance attached to them by the framers, their role in the traditions and collective conscience that underlie our conceptions of ordered liberty, and their contribution to individual and societal well-being"). And even if property rights are not "fundamental" in the narrow legal sense that regulation infringing upon them is subject to the highest level of strict scrutiny—an issue that need not be addressed in this case—still they are of such importance that they may not constitutionally be destroyed without a much stronger justification than that demanded by the First Circuit in this case.

Heightened rationality review (at the least) is also appropriate because arbitrary and irrational law making is peculiarly likely to occur in the context of cost-shifting legislation. The political gains to be had by shifting properly public costs to a small group of private parties are obvious, especially when those targeted are, as in the case of large business entities, often relatively wealthy and unlikely to win public sympathy. For this reason, any "presumption of constitutionality" attaching to economic legislation (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) must be applied with special caution to cost-shifting laws. Characterizing a cost-shifting statute as "economic" provides no guarantee that its effects are benign or that it serves a proper purpose.

B. Retroactive Legislation Must Meet A Higher Standard Than Prospective Legislation

Not only do the Coal Act assessments against Eastern infringe upon the company's property rights, but they do so

retroactively, on the basis of Eastern's conduct three decades ago. Because of the special burdens that retroactive laws impose, this Court has recognized that more is required to justify retroactive than prospective legislation.

Simply put, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992). The Court has said that "[e]lementary considerations of fairness" weigh against retroactive legislation. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). Indeed, retroactive legislation "is contrary to fundamental notions of justice," for "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). The historical pedigree of the idea that retroactive laws present special problems of unfairness was surveyed by Justice Scalia in his concurring opinion in *Kaiser Aluminum* (*id.* at 855-856) and need not be repeated here. Suffice it to say that the concern is "centuries older than our Republic" (*Landgraf*, 511 U.S. at 265) and firmly rooted in American legal history as well as this Court's recent cases.[1/]

[1/] More than simple fairness underlies reservations about retroactive legislation. As the Court noted in *Landgraf*, "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." 511 U.S. at 265-266. The Court also showed that retroactive legislation poses special risks of the abuse of legislative power. *Id.* at 266-267 & n.20.

Because retroactive legislation presents these special problems, it "does have to meet a burden not faced by legislation that has only future effects" when challenged under the Due Process Clause. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). This Court has explained that "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 16-17.

The court of appeals bent language in *Gray* to justify its determination that the "rational basis standard" is the same for both retroactive and prospective economic legislation. Pet. App. 11-12. But rationality review covers a broad spectrum, from the sort of fleeting inquiry conducted by the First Circuit—one that does not meaningfully test the means used by government and that generally amounts to a rubber-stamp—to the heightened review that is routinely conducted in Equal Protection cases where important rights or sensitive classifications are in question. See Laurence H. Tribe, *American Constitutional Law* 1601-1618 (2d ed. 1988). When important property rights are infringed by a retroactive assessment of the type mandated by the Coal Act, heightened rationality review is the least that is constitutionally required.

C. The Court Should Require That Retroactive Cost-Shifting Legislation Meet A Causal Relationship Test

Basic elements of rationality-review-with-teeth are requirements that there be a causal relationship between the conduct of the burdened party and the problem addressed by the governmental action, and at least a rough proportionality between the size of the exaction and the responsibility of the burdened party.

This Court endorsed the causality requirement—the factor that is determinative in this case—in *Turner Elkhorn*, a decision that upheld the retroactive imposition of liability on mine operators for injuries and deaths related to black lung disease. The Court pointed out that if the statute had required compensation for injuries or deaths not causally connected to working in mines, it would have presented a different and much harder case. 428 U.S. at 24-26. The Court thus recognized that a burdened party's causal responsibility for the problems addressed by retroactive economic legislation is central to the evaluation of that legislation under the Due Process Clause. See also *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (in pension plan withdrawal case, "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility"); *Concrete Pipe & Prods.*, 508 U.S. at 647 (O'Connor, J., concurring).

As we have already noted, all of the cases upon which the court of appeals relied involved parties that created the problem addressed by the retroactive legislation. In *Concrete Pipe*, this Court explained that retroactive liability was justified because the employer had "contributed to the plan's probable liability by providing employees with service credits" that counted toward the vesting of benefits. 508 U.S. at 638. *Gray* upheld the application of the same law to employer withdrawals occurring before enactment of the statute. 467 U.S. at 728-731. And *Turner Elkhorn* involved employer liability for benefits due for injuries sustained as a result of working for the employer. In each of those cases, there was a direct causal link between the employer's conduct and the problem addressed by the retroactive statute.

It cannot be proper, in contrast, for the state retroactively to single out a small group of private parties to pay the

costs of remedying a problem not of their making. When the targeted parties played no causal role in creating the problem addressed, there is no justification for requiring them—rather than the responsible parties or the public at large—to bear the costs. The constitutional importance of property rights and the unfairness of retroactively imposing massive, unanticipated costs make such a lack of justification fatal. If due process is to be a meaningful protection, retroactive cost-shifting legislation is permissible only if the burdened party's conduct played a direct causal role in creating the problem addressed and thus in creating the need for funds.[2/]

Guided by this principle, the resolution of Eastern's due process claim is straightforward. Eastern did not cause or contribute to the retiree health benefits funding crisis addressed by the Coal Act. Nothing in the record supports the astonishing proposal that Eastern must pay $100 million

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[2/] We recognize that on several occasions this Court has upheld the retroactive application of tax statutes that may not satisfy this test. See *United States* v. *Carlton*, 512 U.S. 26, 30 (1994) (citing cases). Whatever the justification for retroactive tax laws, it cannot be extended to the Coal Act's super-reachback assessments. As the Court noted in *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981), retroactivity in tax laws is "a customary congressional practice" and has been "confined to short and limited periods required by the practicalities of producing national legislation." See also *Carlton*, 512 U.S. at 32 (relying on statute's "modest period of retroactivity" to find that it did not violate the Due Process Clause); *id.* at 38 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise * * * serious constitutional questions"). These tax statutes stand in sharp contrast to the retroactive provisions of the Coal Act, which are extremely unusual, could not have been anticipated, impose retroactive liability reaching back more than *thirty years,* and enjoy no special pragmatic justification.

the astonishing proposal that Eastern must pay $100 million for retirement benefits that it never promised to any worker. The imposition of retroactive liability against Eastern fails meaningful rational basis review and violates the Due Process Clause.

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

DANIEL J. POPEO
PAUL D. KAMENAR
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY W. SARLES
KASPAR J. STOFFELMAYR
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-42

EASTERN ENTERPRISES,
Petitioner,
v.
KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE THE PITTSTON COMPANY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Pittston Company ("Pittston") is a Virginia corporation headquartered in Richmond.[1] The company's predecessors and subsidiaries have been mining coal in the eastern United States since 1838.

The Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. §§ 9701-9722, establishes the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and obligates certain

[1] Pursuant to Sup. Ct. R. 37.6, Pittston advises the Court that this brief was not authored in whole or in part by counsel for any party and that no person other than Pittston has made a monetary contribution to the preparation or submission of this brief.

companies ("assigned operators") to contribute to it. To date, Pittston and its subsidiaries have been "assigned" over 5,000 beneficiaries and have paid almost $50,000,000 in "premiums" under the Act. The future liabiliites of Pittston and its subsidiaries under the Coal Act are projected to be in excess of $200,000,000.

Pittston submits this brief on the issue of severability. If some of the funding provisions of the Coal Act are unconstitutional, do the remainder stand? Pittston is materially interested in this question because the loss of one funding source will impose additional liability on one or more of the remaining funding sources, and possibly on Pittston subsidiaries.

This brief is being filed by consent of the parties. Letters of consent have been lodged with the Clerk.

SUMMARY OF ARGUMENT

The provisions of the Coal Act relating to funding of the Combined Fund are "inextricably bound together" and "must stand or fall as a unit." *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976). If one source of revenue is eliminated, the remaining sources will have to pay more. The Court cannot invalidate part of the law without materially affecting what remains.

There is "strong evidence" that Congress intended to require contributions from *all* former employers—or to require contributions from none of them. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The legislative record shows Congress would not have established the Combined Fund without including pre-1978 signatories like Eastern Enterprises. The inclusion of these so-called "super-reachback" companies was critical to passage of the Coal Act, and there would have been no Combined Fund without them. Indeed, adding the super-reachbacks was "the essence" of the bipartisan compromise that led to passage of the Act. 138 Cong. Rec. S17603-04 (daily ed. Oct. 8, 1992) (Conf. Rep.). These facts easily overcome any presumption of severability arising under 26 U.S.C. § 7852(a).

If the Court invalidates some of the provisions of the Coal Act relating to the Combined Fund, it must invalidate all of them. Otherwise, the Court will be simply rewriting the statute and reordering the benefits and burdens of the law.

ARGUMENT

I. THE COAL ACT IS UNIQUE

The Coal Act is unique, and the controversies that it has generated both in Congress and in the courts should come as no surprise.

While entitled the "Coal Industry Retiree Health Benefit Act," the Act actually provides benefits to only one segment of coal industry retirees—those represented by the United Mine Workers of America ("UMWA"). The law provides no benefits to nonunion or non-UMWA retirees with similar work histories.

Although the Act is often described as providing basic health care for UMWA beneficiaries, most of the beneficiaries are already covered by Medicare. Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retirees" Health Benefits, reprinted in* 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992). For them, the Act essentially functions as a "Medigap" policy, providing prescription drug and other benefits not available to other Medicare recipients. *Id.*

While Congress sought to identify and impose liability on the "persons most responsible for [UMWA] plan liabilities," the Coal Act requires companies to provide lifetime health care to employees who worked for them as little as one shift, and as far back as 45 years ago. Coal Act, Pub. L. No. 102-486, Tit. XIX, Subtit. C, § 19142, 106 Stat. 3037 (1992) (Findings and Declaration of

Policy); *see* 26 U.S.C. § 9706. In so doing, the Act displaced collective bargaining agreements that previously determined contributions to the UMWA Funds. 26 U.S.C. § 9708.

In Congress, the Coal Act was "one of the most contentious pieces of legislation" its sponsors had ever seen. 138 Cong. Rec. S10783 (daily ed. July 29, 1992) (statement of Sen. Rockefeller). In the courts, the Act has proven no less contentious or controversial. *See Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir.), *cert. denied*, 117 S. Ct. 682 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *Lindsey Coal Mining Co. Liquidating Trust v. Shalala*, 90 F.3d 688 (3d Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *In re Chateaugay*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995).

II. THE STANDARD FOR SEVERABILITY

The standard for determining severability has remained constant for many years.

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if that which is left is fully operative as a law.

Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). To be fully operative as a law, what is left must be "functionally independent" of what is removed. *United States v. Jackson*, 390 U.S. 570, 586 (1968). A partially invalidated law must also function in a manner consistent with the intent of Congress. *Alaska Airlines*, 480 U.S. at 685. If it is evident that Congress "would not have passed" the law "had it known the challenged

provision was invalid," the law is not severable. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985).

A severability clause[2] gives rise to a presumption that the law is severable. *Alaska Airlines*, 480 U.S. at 686. But the Court's overall objective remains to determine Congress's intent. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). Even with a severability clause, a law will not be severed when there is "strong evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 686; *INS v. Chadha*, 462 U.S. 919, 1014 (1983) (Rehnquist, J., dissenting). As a result, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *Jackson*, 390 U.S. at 586 n.27.

III. THE STRUCTURE OF THE COMBINED FUND

The Combined Fund provides benefits to UMWA retirees and their dependents who were eligible for and receiving benefits from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of July 20, 1992. 26 U.S.C. § 9703(f). At present, there are approximately 75,000 people in this group.

The Combined Fund is financed primarily from "premiums" paid by "assigned operators." *Id.* The Act also provides for transfers to the Combined Fund of certain amounts from the 1950 UMWA Pension Plan, which was overfunded, as well as interest from the Abandoned Mine Reclamation Fund, also known as the Abandoned Mine Land Fund ("AML Fund"). *Id.* § 9705; 30 U.S.C. § 1232(h).

The purpose of the Act is to assign as many beneficiaries as possible to former signatory employers. Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (Act

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[2] While the Coal Act contains no severability clause, the Act was included in the Internal Revenue Code, which does have a general severability clause as discussed *infra* pp. 12-13.

intended "to identify the persons most responsible for plan liabilities"); 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conf. Rep.) ("overriding purpose is to find and designate a specific obligor for as many beneficiaries in the Plans as possible").

Congress carefully crafted the order in which assignments must be made. 26 U.S.C. § 9706(a). A retiree is first assigned to the signatory operator which was a 1978 or later signatory and was the most recent signatory operator to employ the retiree for at least two years. *Id.* § 9706(a)(1). If there is no such operator, the retiree is assigned to the signatory operator which was a 1978 or later signatory and was the most recent signatory operator to employ the retiree—regardless of length of service. *Id.* § 9706(a)(2). Finally, if a retiree cannot be assigned under either of these criteria, the retiree is assigned to the signatory operator which employed the retiree for the longest period of time before 1978. *Id.* § 9706(a)(3). Any retiree who cannot be assigned under any of these criteria is an "unassigned beneficiary." *Id.* § 9704(d).

Assigned operators must pay an annual premium for each beneficiary assigned to them. *Id.* § 9704(b). For 1997, the premium is $2,343.31 per beneficiary. Assigned operators are also liable for an "unassigned beneficiaries premium" if the transfers from the AML Fund are insufficient to pay for the health care of the unassigned beneficiaries. *Id.* §§ 9704(d), 9705(b).

To date, the annual transfers from the AML Fund (and the earlier, non-recurring transfers from the 1950 UMWA Pension Plan) have been sufficient to pay for the health care costs of the unassigned beneficiaries, but there are limits on the amount of AML money which may be transferred to the Combined Fund. 30 U.S.C. § 1232(h). If the limits are reached, an unassigned beneficiaries premium will be assessed against the assigned operators. 26 U.S.C. § 9704(d). Each assigned operator must then pay

its pro rata share of the cost of providing health care to the unassigned beneficiaries.

If the Coal Act is declared unconstitutional as to Eastern Enterprises and other pre-1978 signatories, a significant source of funding for the Combined Fund will be eliminated. Two possible results are:

> (1) These beneficiaries become "unassigned" (notwithstanding the fact that the statute provides for their assignment) and are placed in the unassigned beneficiary pool. This would result in a much larger diversion of money from the AML program.[8] 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). Should available AML money not cover the costs of providing health care to the unassigned beneficiaries, the remaining operators would have to pay an unassigned beneficiary premium. 26 U.S.C. § 9704(d).
>
> (2) The beneficiaries are reassigned to remaining signatory operators, contrary to the order of assignments in the existing statute. Under this scenario, retirees now assigned to Eastern and similarly situated companies would be reassigned to other signatory operators who employed the retirees, if only for a day. This would, of course, increase the premiums paid by the remaining operators.

This much is clear: The Court cannot eliminate one funding source without increasing the burden on other sources. This is not a case where the Court can strike one portion of the statute and leave the rest unaffected.

---

[8] The AML program is part of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328. As its name implies, the program is designed to provide for the "reclamation and restoration of land and water resources adversely affected by past coal mining." *Id.* § 1231(c)(1). The program is primarily funded by per ton fees that companies pay on their coal production. *Id.* §§ 1231(b)(1), 1232(a). For a discussion of how the Coal Act uses AML fees, see the report by the Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retirees" Health Benefits, reprinted in* 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992).

This conclusion becomes all the more clear when one considers cases in which the Court *has* found an invalid provision to be severable. *Alaska Airlines*, 480 U.S. 678, is illustrative. In that case the Court found an invalid provision for a legislative veto to be severable from the Employee Protection Program to which it had been attached. The Court distinguished between the substantive provisions of the Act—the arrangement for assisting airline employees dislocated as a result of deregulation of commercial air carriers—and the legislative-veto provision. Such a provision "by its very nature is separate from the operation of the substantive provisions of a statute." 480 U.S. at 684-85.

Similarly illustrative is *Jackson*, 390 U.S. 570. The Court found the death penalty clause of the Federal Kidnapping Act to be unconstitutional but held that it was severable from the remainder of the statute. The Court's decision turned upon its finding that the death penalty clause "is a functionally independent part of the Federal Kidnapping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." 390 U.S. at 586.

Both *Alaska Airlines* and *Jackson* point out the difference between substantive portions of a statute and provisions, such as the legislative veto in *Alaska Airlines* or the death penalty clause in *Jackson*, whose invalidation leaves Congress's substantive arrangement in place. In the present case, the provision challenged by Eastern is an intrinsic part of the Coal Act's substantive operation. Eliminating the challenged provision of the Act *would* alter the statute's substantive reach and *would* change its basic operation. The provisions of the Coal Act relating to the Combined Fund are "mutually dependent upon one another," *Carter*, 298 U.S. at 313, and "inextricably bound together," *Danforth*, 428 U.S. at 83, and therefore may not be severed.

The intricate, fully integrated funding scheme of the Coal Act cannot function as designed by Congress if one

of the funding sources is eliminated. Any attempt to sever the funding mechanism as it applies to super-reachbacks, but to leave it otherwise intact, would result in a fundamentally different Coal Act—a result not of the legislative process, but of the Court's decree. If the Court declares part of the financing system for the Combined Fund unconstitutional, it should invalidate all aspects of the financing scheme and leave it to Congress to undertake any redesign of the Coal Act it thinks appropriate. The Court should not readjust the benefits or burdens of the law in the name of severability.

IV. LEGISLATIVE INTENT

A statute is not severable if Congress would not have passed the statute "had it known the challenged provision was invalid." *Brockett*, 472 U.S. at 506. In this case, there is compelling evidence that Congress would not have established the Combined Fund without the participation of the super-reachbacks like Eastern Enterprises.

In the years before the Coal Act, the 1950 and 1974 UMWA Health Funds began to run large deficits. *See Coal Commisssion Report: A Report to the Secretary of Labor and the American People* (November 1990). The Bituminous Coal Operators' Association ("BCOA") and UMWA blamed these deficits on employers who left BCOA and ceased contributing to the Funds. *See Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong. 39, 43, 278, 296 (1991) ("Coal Commission Hearing"). Others blamed the deficits on the failure of BCOA and UMWA to set an appropriate contribution rate and on BCOA's subsequent refusal to honor the "guarantee clause," which required BCOA to increase contributions as necessary to maintain health benefits. *See id.* at 25, 30-31, 212; *McGlothlin v. Connors*, 142 F.R.D. 626, 644-45 (W.D. Va. 1992).

The primary proponents of a legislative solution to this health care "crisis" were BCOA and UMWA, whose wage agreement was scheduled to expire in 1993. 137 Cong. Rec. S17061 (daily ed. Nov. 19, 1991) (statement of Sen. Rockefeller). It was expected that financing for the 1950 and 1974 Health Funds would be a major, perhaps insurmountable, issue in the negotiations for a new contract. 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992) (Conf. Rep.). BCOA and UMWA therefore formed a coalition to promote legislation that would shift a part of retiree health care costs to others. Staff of House Comm. on Ways and Means, 103d Cong., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 50-51 (Comm. Print. 1993).

Much of the legislative debate centered on how to fund the health care of "orphans," retirees whose employers no longer contributed to the UMWA Funds. The orphans' former employers were accused of "dumping" their "liabilities" on BCOA. Coal Commission Hearing at 41, 44. Companies like the Pittston subsidiaries, which left BCOA and negotiated their own agreement with UMWA on contributions to the Funds, were also criticized for having signed "nonconforming" agreements.[4]

[4] A "nonconforming" agreement was one with contribution rates that differed from the rates in the National Bituminous Coal Wage Agreement negotiated between BCOA and UMWA. In *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993), the court held that an "evergreen clause," incorporated into the NBCWAs from trust agreements, required Pittston subsidiaries to contribute at the NBCWA rates even though they were no longer members of BCOA. Thus construed, the "evergreen clause" gave UMWA and BCOA the power to set contribution obligations for the rest of the unionized coal industry, including Pittston subsidiaries and other independent producers.

Even the most expansive reading of the so-called evergreen clause, however, cannot impose an obligation upon a coal company, such as Eastern, which was never signatory to a 1978 or later NBCWA, inasmuch as this provision, which underlies the decision in *Pittston*, was not part of any NBCWA prior to 1978. Moreover, there is no suggestion in *Pittston* that an obligation to contribute to the UMWA Funds can extend beyond the time a signatory employer ceased to have employees covered by a labor contract with the UMWA, since the only measures of such obligations were (i) hours of employment or (ii) tons of coal produced by employees covered by such a contract.

There were many different legislative proposals for resolving the "crisis" at the UMWA Funds. These proposals included bills imposing an industry-wide tax and limited reachback liability, such as S. 1989, 102d Cong. (1991), as well as countermeasures imposing funding liability only on current signatories, such as S. 2550 102d Cong. (1992). Until the crafting of the Coal Act, however, no proposal was satisfactory to both Congress and the President.

The Coal Act was a "bipartisan compromise"; its key feature was the imposition of liability on all former signatories to NBCWAs. 138 Cong. Rec. S17612 (daily ed. Oct. 8, 1992) (Conf. Rep.) As Senator Rockefeller explained, expanded reachback liability took the place of an earlier proposal for an industry-wide tax, which had been vetoed by the President.

> The funding mechanism in [the Coal Act] is the one proposed by the administration and on which the administration insisted . . . .
>
> Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.

138 Cong. Rec. S17633 (daily ed. Oct. 8, 1992). The Conference Report on the Coal Act stated that expanded reachback liability was "the essence" of the agreement for the bill. 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992); *see also* 138 Cong. Rec. S10783 (daily ed. July 29, 1992) (statement of Sen. Rockefeller). The Act's

"overriding purpose [was] to find and designate a specific obligor for as many beneficiaries in the Plans as possible." 138 Cong. Rec. S17604.

Based on this history, there is no doubt that the super-reachback provisions of the Coal Act were essential to its passage. If the Court were to strike those provisions and leave the remainder of the Act intact, it would be creating a statute that otherwise would not have become law.

Although the Coal Act is part of the Internal Revenue Code and the premiums that assigned operators must pay are taxes,[5] *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1251 (1997); *In re Chateaugay Corp.*, 53 F.3d at 498, any presumption of severability from 26 U.S.C. § 7852(a) is weak at best.[6] It makes sense, of course, to apply the principle of severability to the Internal Revenue Code writ large—a huge array of provisions touching every aspect of the revenue system. The Code has come into being and has evolved over a long period of years, the result of many enactments. There is, accordingly, good reason to apply the principle of severability to the Code

[5] While the contributions which assigned operators must pay constitute federal revenues, Congressional Research Service, *Budget Treatment of the UMWA Retiree Health Benefit Program*, 93-979-E, pp. 1, 5-6 (1993), these contributions are collected, managed, and spent by the UMWA Combined Benefit Fund, a privately appointed entity over which the government exercises no control. For this reason, in a case now pending in United States District Court for the Eastern District of Virginia, Pittston argues that the Coal Act violates the nondelegation and separation of powers doctrines. *Pittston Co. v. United States*, No. 3:97 CV 294 (E.D. Va. filed April 24, 1997).

[6] 26 U.S.C. § 7852(a), which was part of the Internal Revenue Code when the Coal Act was passed, provides:

> If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

as such. By contrast, however, the Coal Act came into being at a later, single point in time. Unlike the Internal Revenue Code, the Coal Act represents an effort by Congress to achieve a comprehensive settlement of a specific problem.

The Coal Act itself contains no severability clause, and there is no direct indication that Congress intended the funding sources in the Coal Act to be severable. All the evidence is, in fact, to the contrary. Severability should not turn on a presumption which is contradicted by both the structure of the statute and its legislative history. *Jackson*, 390 U.S. at 585 n.27; *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991).

V. SEVERABILITY SHOULD BE DECIDED NOW

It is the policy of the Court to decide constitutional issues only as necessary to dispose of a case. *Brockett*, 472 U.S. at 501. This policy must be distinguished, however, from the Court's duty to declare whether a partially invalidated statute is severable. *Alaska Airlines*, 480 U.S. at 684. When the Court decides severability, it is not ruling on the constitutionality of what remains, but on whether anything remains. This is primarily an issue of legislative intent. If Congress would not have enacted the statute without its objectionable features, the Court must declare it nonseverable.

In *Printz v. United States*, 117 S. Ct. 2365 (1997), the Court declined to decide the severability of the Brady Act because none of the parties to the case was affected by its remaining provisions. In that case, however, the invalidated provision, which obligated local officials to carry out federal law, had no effect on the remaining provisions of the Act, which imposed reporting requirements on gun dealers. In the present case, by contrast, a partially invalidated statute will result in added burdens on the remaining funding sources, and the Court should

not postpone its severability decision. As the Court recognized in *United States v. Raines*, 362 U.S. 17, 23 (1960), declaring a statute nonseverable does not violate prudential concerns when Congress intended nothing less than the entire law.

CONCLUSION

The provisions of the Coal Act relating to the Combined Fund are not severable, and the Court should so declare.

Respectfully submitted,

A.E. DICK HOWARD
(Counsel of Record)
627 Park Street
Charlottesville, VA 22902
(804) 293-6668

STEPHEN M. HODGES
WADE W. MASSIE
PENN, STUART & ESKRIDGE
208 East Main Street
Abingdon, VA 24210
(540) 628-5151

GREGORY B. ROBERTSON
HUNTON & WILLIAMS
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200
Counsel for Amicus Curiae
The Pittston Company

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IN THE
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SHIRLEY S. CHATER,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMICI CURIAE PARDEE & CURTIN LUMBER COMPANY AND THE HILLMAN COMPANY IN SUPPORT OF PETITIONER

ARTHUR NEWBOLD
(Counsel of Record)
ETHAN D. FOGEL
ANDREW S. MILLER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-4000
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Coal Commission, *Coal Commission Report, A Report to the Secretary of Labor and the American People* (Nov. 1991) ("Coal Commission Report") 8, 19, 20

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John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. Va. L. Rev. 63 (1991) (citing Education and Public Welfare Division, Congressional Research Service, Pub. IB88004, *Health Benefits for Retirees: An Uncertain Future* (1990)) 21

Keith Dix, *What's a Coal Miner to Do? The Mechanization of Coal Mining* (1988) 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-42

EASTERN ENTERPRISES,
Petitioner,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE PARDEE & CURTIN LUMBER COMPANY AND THE HILLMAN COMPANY IN SUPPORT OF PETITIONER

This brief is submitted in support of the petitioner. Counsel for all parties have consented to the filing of this amicus brief, and their letters of consent have been filed with the Clerk of the Court by the amici.

INTEREST OF AMICI CURIAE [1]

Amici Pardee & Curtin Lumber Company ("Pardee") and The Hillman Company ("Hillman") have been out of the coal mining business for 38 and 34 years, respectively. Amicus Pardee today is a land company. Amicus Hillman is a diversified investment company.[2] Like the petitioner,

[1] Pursuant to Sup. Ct. R. 37.6, the amici advise the Court that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the amici or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] As used herein "Hillman" also refers as appropriate to the affiliates of The Hillman Company or its predecessors which previ-

Eastern Enterprises, the amici have been retroactively assigned responsiblity under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C.A. § 9701-22 (West Supp. 1997) ("the Coal Act"), to fund lifetime health benefits for numerous retired members of the UMWA and certain of their dependents. Like the petitioners, the amici are members of a group of former coal operators which have come to be called the "super-reachbacks."[3] This name refers to the fact that the Coal Act reaches back over decades to make the super-reachbacks pay for current UMWA retiree health benefits even though they never agreed to pay for such benefits. The amici ceased mining coal long before such benefits were first made available to UMWA miners.

The amici agree with the petitioner that it is unconstitutional for the Coal Act to require the petitioner to pay for lifetime health benefits for UMWA miners when it never agreed to pay for such benefits and ceased mining coal long before any NBCWA even arguably provided for such benefits. Like the petitioner, Pardee and Hillman exited the coal industry decades ago, having ceased all coal mining operations in 1959 and 1963, respectively. The amici urge the Court to reverse the judgment of the Court of Appeals.

STATEMENT OF FACTS

A. The Amici Ceased All Coal Mining Operations Over Thirty Years Ago

The amici ceased all coal mining operations over 30 years ago. Pardee closed its last mines and ceased mining operations in 1959. Hillman stopped mining coal in 1963.

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ously mined coal with the United Mine Workers of America ("UMWA"). The Hillman Company itself never actually engaged in coal mining; nor did it sign any wage agreements with the UMWA.

[3] The term "super-reachbacks" refers to those operators that last signed a National Bituminous Coal Wage Agreement ("NBCWA") prior to 1978.

Thereafter, Pardee and Hillman never again conducted coal mining operations, either with UMWA or non-union miners.[4]

By the time Pardee and Hillman stopped mining, each had paid all contributions that they were required to make to the UMWA's Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). Pardee contributed a total of $2,656,000 in premiums to the 1950 W&R Fund or its predecessors up to 1959, when Pardee ceased mining operations. Although Hillman does not have complete records, it estimates that it contributed at least $4,500,000 in premiums to the 1950 W&R Fund from 1952 up to 1963.

The 1950 W&R Fund was financially sound in 1959, when Pardee ceased mining coal, and in 1963, when Hillman ceased mining coal. In fact, in 1963 the 1950 W&R Fund had a positive balance of $113,099,804. R.A. 1111 (1950 W&R Fund Annual Report for 1963 at 3).[5] After the amici ceased mining coal, and until the passage of the Coal Act, they were never again asked or obligated to pay for health benefits provided to UMWA miners.

B. Operation of the UMWA Welfare and Retirement Fund While the Petitioner and the Amici Mined Coal

To understand why there is no rational basis for requiring the petitioner or the amici to pay for lifetime health benefits for UMWA miners today, one must understand how the UMWA 1950 W&R Fund functioned during the period that the petitioner and the amici were active in the coal mining industry. Like the petitioner, the amici signed the National Bituminous Coal Wage Agreement (NBCWA) of 1950, a collective bargaining agreement be-

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[4] After they ceased mining operations, both amici retained coal lands, some of which were leased to coal mining companies.

[5] As used herein "R.A.," refers to the joint appendix submitted to the Court of Appeals below by the parties. As used herein, "J.A." refers to the Joint Appendix filed under Sup. Ct. R. 26.

tween the UMWA and various bituminous coal operators that established a UMWA health benefits plan funded by the coal operators. R.A. 635. Under the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, 1958, 1964 and 1966 (the last amendment which either amicus signed) and under the 1968 NBCWA, the petitioner and the amici agreed to fund the 1950 W&R Fund by paying for each ton of coal mined an amount negotiated in successive NBCWAs.[6] Under the 1950 NBCWA, the coal operators' initial contribution rate was 30 cents per ton of coal. R.A. 638.

The 1950 W&R Fund promised no particular or "defined" benefits to its beneficiaries, and so its contributing operators, such as the petitioner and the amici, were not required to fund any particular type of benefits for the beneficiaries. Rather, the contributing operators were only obligated to pay their per-ton contributions to the Fund. Thus, the 1950 W&R Fund was, at best, a "defined contribution" fund as opposed to a "defined benefit" fund.[7]

Instead of promising any defined benefits, the 1950 NBCWA only stated in general terms that the purpose of the 1950 W&R Fund would be to:

> make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302(c) of the 'Labor-Management Relations Act, 1947' as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947.'

R.A. 639 (1950 NBCWA at 60-61). No further detail was supplied on the benefits to be provided by the Fund. Instead, the trustees of the Fund were given complete authority to determine who would be eligible and what benefits were to be paid. *See* R.A. 639 (1950 NBCWA at 61). Thus, the 1950 NBCWA provided that the trustees had:

> full authority . . . with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

R.A. 639. (1950 NBCWA at 61). The trustees of the 1950 W&R Fund retained this ultimate authority to set benefits during the entire time that the amici contributed to the Fund.

The benefits that the trustees of the 1950 W&R Fund decided to pay were never permanently guaranteed, even

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[6] R.A. 635 (1950 NBCWA); R.A. 649 (1952 amendment); R.A. 654 (1955 amendment); R.A. 657 (1956 amendment); R.A. 660 (1958 amendment); R.A. 666 (1964 amendment); R.A. 686 (1966 amendment); R.A. 702 (1968 NBCWA). Although Hillman ceased mining coal in 1963 and made its last payments to the 1950 W&R Fund that year, it signed the 1964 and 1966 amendments to the 1950 NBCWA and the 1968 NBCWA because it employed some UMWA-represented employees in a non-mining capacity until 1969.

[7] *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 230 (1986) (O'Connor, J. concurring) ("a defined contribution plan does not specify benefits to be paid").

during the term of the then-current NBCWA—they could be modified or entirely revoked by the trustees at any time without legal restriction. The Fund's 1955 Annual Report stressed that:

> Trustee regulations governing Benefits specifically provide that all Benefits which have been authorized are subject to termination, suspension, revision, or amendment by the Trustees in their discretion at any time. . . . *No vested interest in the Fund extends to any Beneficiary.* The Trustees have full authority within the terms of the Trust Agreement and applicable law to determine the types and amounts of Benefits which shall be granted, and to establish eligibility requirements.

R.A. 955-56 (1958 Report of the 1950 W&R Fund at 20-21) (emphasis added). Subsequent annual reports issued during the time that the petitioner and the amici mined coal repeated this statement.[8] Each beneficiary was officially notified of this governing provision at the time his benefits were authorized. *See* Annual Reports cited in note 8 *supra*.

Thus, the amici never promised that the 1950 W&R Fund would provide lifetime benefits to the UMWA miners. *See Blue Diamond Coal Co. v. Shalala,* 174 B.R. 722, 724 (E.D. Tenn. 1994) (noting that the Fund "promised its beneficiaries no permanent or perpetual benefits. In fact, beneficiaries of this plan were specifically told that benefits were revocable and not vested"), *aff'd,* 79 F.3d 516 (6th Cir. 1996).

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[8] See R.A. 995-96 (1959 Report of the 1950 W&R Fund at 27-28); R.A. 1028-29 (1960 Report of the 1950 W&R Fund at 19-20); R.A. 1047 (1961 Report of the 1950 W&R Fund at 5); R.A. 1080 (1962 Report of the 1950 W&R Fund at 5); R.A. 113 (1963 Report of the 1950 W&R Fund); R.A. 1146 (1964 Report of the 1950 W&R Fund at 8); R.A. 1191 (1965 Report of the 1950 W&R Fund at 18); R.A. 1223 (1966 Report of the 1950 W&R Fund at 19).

The 1950 W&R Fund trustees frequently exercised their unilateral authority to terminate, decrease, or otherwise modify the benefits paid to beneficiaries. For example, in 1950 the trustees "rescinded health benefit coverage for 'the treatment of paraplegics and severely handicapped miners at special treatment and rehabilitation centers.' " R.A. 1238, 1235 (Resolution Nos. 12 and 11 of the 1950 W&R Fund). In 1953, the trustees "rescinded" the payment of death benefit gratuities previously paid by the Fund. R.A. 1246, 1231 (Resolution Nos. 25 and 9 of the 1950 W&R Fund). In 1954 the trustees rescinded the provision of "maintenance aid for dependent children and widows" of miners killed in the mines. R.A. 1247 (Resolution No. 35 of the 1950 W&R Fund). The 1950 W&R Fund had previously been paying $40.00 per month for "dependent children of deceased miners who are living with their mothers," $10.00 for each additional child and $30.00 "less regular income received from any source" for "widows of miners fifty (50) years of age or over who have no dependent children." R.A. 1243 (Resolution No. 16 in the 1950 W&R Fund). Also in 1954 the trustees "rescinded" the provisions of "rehabilitation" benefits and maintenance aid to miners." R.A. 1248 (Resolution No. 36 of the 1950 W&R Fund). The 1950 W&R Fund had previously been paying a "rehabilitation benefits of $30.00 per month, with an additional $10.00 for their wives and additional $10.00 for each child under 18 years of age." R.A. 1240 (Resolution No. 14 of the 1950 W&R Fund).

These and many other cutbacks were necessary because coal production fell at various times during the 1950's and 60's, and consequently the contributions from the coal operators also declined. With the Fund operating on a "pay-as-you-go" basis, it had no choice but to reduce benefits in order to preserve fiscal stability. Thus, no miner could possibly have had the impression that he was somehow guaranteed defined lifetime benefits.

During the time that the petitioner and the amici mined coal, the 1950 W&R Fund trustees also acted unilaterally to modify the eligibility requirements for a variety of benefits whenever the financial situation of the 1950 W&R Fund required. In an effort to curtail hospital expenses in 1957, the 1950 W&R Fund unilaterally implemented what were then radical changes to procedures for hospital admissions. R.A. 943-948 (1958 Report of the 1950 W&R Fund at 7-12). In 1960 the trustees took further dramatic steps to "curtail the excess of expenditures over income." R.A. 1011 (1960 Report of the 1950 W&R Fund at 2). To reduce these expenditures the trustees: "limited or terminated eligibility for Trust Fund Benefits," *id.*; "limited eligibility of unemployed miners for [Hospital, Medical, and Surgical] Services to one year after the date of the last regular employment in a classified job in the mine of [a signatory] operator . . . and terminated eligibility of miners for these services even though they may be, or may have been, performing classified work, if self-employed or in any way connected with ownership, operation or management of a mine." *Id.* (R.A. 1021). The trustees also eliminated "Funeral Expense and Widows and Survivors Benefits" for dependents of a deceased miner if the miner was unemployed for more than a year since his last job with a signatory operator. R.A. 1027 (1960 Report of the 1950 W&R Fund at 18). In 1961 the trustees reduced the amount of monthly pension benefit by 25 percent. R.A. 1044 (1961 Report of the 1950 W&R Fund at 2).

Thus, the UMWA miners were well aware that the trustees of the 1950 W&R Fund regularly exercised their authority to change, reduce or eliminate benefits or modify the rules governing eligibility for benefits. R.A. 1353 (Coal Commission, *Coal Commission Report, A Report to the Secretary of Labor and the American People* (Nov. 1991) ("Coal Commission Report") at 23); *Blue Diamond*, 174 B.R. at 724.

C. In 1974 the BCOA and the UMWA Created a New System of Defined Health Benefits

As was noted above, the amici ceased mining coal in 1959 and 1963, and the petitioner ceased mining coal in 1965. Years after the petitioner and the amici left the industry, the BCOA and the UMWA materially changed the UMWA health benefits funding system. In the NBCWA signed in 1974, the BCOA and UMWA agreed to dissolve the 1950 W&R Fund and replace it with two new health benefit funds and two new pension funds. The liquidated assets of the 1950 W&R Fund—$91,132,782—were transferred to one of the two new pension funds. Meanwhile, the BCOA and the UMWA created two new health benefit funds: the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust (hereinafter referred to collectively as the "1974 Health Benefit Funds").[9] The 1974 Health Benefit Funds started with zero funding because, as was noted above, the assets of the dissolved 1950 W&R Fund had been transferred to a new pension fund.

The 1974 Health Benefit Funds were established as defined benefit plans, meaning that the miners and other beneficiaries were promised defined types and levels of benefits for the first time in the history of the UMWA's health and welfare funds. Moreover, in 1974 the discretion of the Funds' trustees to alter or terminate benefits was eliminated. *See* R.A. 759 (1974 NBCWA at 106); R.A. 1253 (1977 Annual Report at 3).

As part of the new defined benefit package, the 1974 NBCWA promised for the first time that many beneficiaries would receive a "Health Services card for life" from the 1974 Health Benefit Funds. R.A. 755-59. For example, the 1974 NBCWA provided that any pensioned miner

[9] R.A. 748 (1974 NBCWA at 84). The 1950 Benefit Fund and the 1974 Benefit Fund provided health and other benefits, but not pension benefits, to coal miners who retired either before January 1, 1976 (1950 Benefit Fund) or after January 1, 1976 (1974 Benefit Fund).

would "retain his Health Services card until death" and that "his widow will retain a Health Services card until her death or remarriage." R.A. 755 (1974 NBCWA at 99). The widows of miners disabled as a result of a mine accident before May 29, 1946 were provided health benefits until death or remarriage. R.A. 758 (1974 NBCWA at 105).

As a result of the same 1974 NBCWA, the BCOA and the UMWA also added large numbers of newly-eligible beneficiaries who had never ben covered before. Prior to the 1974 NBCWA, only "Widows of Men Killed in Mines" were entitled to continued benefits after the death of a miner. The 1974 NBCWA extended health benefits to all widows of UMWA retirees. R.A. 758 (1974 NBCWA at 105). Health services cards were also provided, for the first time under the 1974 NBCWA, to disabled miners and the disabled and mentally retarded children of miners. R.A. 758-59 (1974 NBCWA at 105-106). The 1977 Annual Report and the UMWA Health and Retirement Fund noted that "as a result, the number of eligible benefit recipients jumped dramatically. Thousands of widows and disabled mine workers became eligible for benefits not previously available." [10]

The 1978 NBCWA, which neither the petitioner nor the amici signed, again made major changes in the health benefits program for the UMWA retirees, their spouses and dependents. That contract contained, for the *first* time, a "guarantee clause," which provided that signatory operators would fully fund health benefits for the term of the agreement in order to prevent funding shortfalls. To achieve this full funding, the BCOA assumed the unilateral authority to increase contribution rates from signatories to the 1978 NBCWA as necessary. R.A. 788.

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[10] According to the 1976 Annual Report of the UMWA Health and Retirement Funds, during the first two years of the 1974 NBCWA the number of beneficiaries grew by 28 percent—from 630,000 to 805,000.

Also in 1978, the Plan documents for the 1974 Health Benefit Funds were amended through negotiations between the BCOA and the UMWA to include, for the *first* time, what is known as the "evergreen" clause, which required signatories to make plan contributions as required under the 1978 NBCWA and "any successor agreements thereto" in accordance with contribution formulas provided by the agreement.[11] Thus, because of the changes made in 1974 and 1978, the contributing coal operators of the BCOA were obligated to fund a defined level of benefits, rather than merely make, as under the 1950 W&R Fund, a fixed per-ton contribution. This was a significant change because it meant that BCOA coal operators could suddenly become liable for much higher contributions if the cost of the benefits suddenly increased because, for example, the cost of health care increased.[12]

In the face of these new undertakings, in the late 1980's the 1974 Health Benefit Funds began to experience revenue shortfalls resulting in serious funding deficits. Ultimately, these funding deficits led Congress to pass the 1992 Coal Act. The Act rescued the 1974 Health Benefit Funds by creating the UMWA Combined Benefit Fund (the "Combined Fund") to assume their liabilities.

D. The Amici Have Been Made Liable for Paying Lifetime Benefits to UMWA Miners Under the Coal Act Although They Never Agreed To Do So

Under the Coal Act, the petitioner and the amici are now required to pay premiums to the Combined Fund in

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[11] R.A. 787-88. In this brief, when reference is made to "lifetime benefits," Health Services cards "for life," or the "evergreen clause" obligations, the amici are not expressing a view concerning whether the "lifetime benefits" or "evergreen clause" obligations, or the obligation to provide a Health Services card "for life," extended beyond the life of the relevant NBCWA. The amici were not parties to the 1974 or later NBCWAs.

[12] The 1974 Health Benefit Funds' 1975 Annual Report characterized the changes wrought by the 1974 NBCWA as "monumental" and stated that they would "have long-lasting and historic effects."

order to pay for lifetime health benefits for retired UMWA miners, their spouses and certain dependents. Congress imposed this liability on the petitioner and the amici even though they had no part in creating any expectation of lifetime benefits on the part of UMWA retirees.

More specifically, under the Act Hillman has been billed for 376 former employees or their dependents and has been assessed for total premiums of $3,601,200 for the period ending September 30, 1998. Hillman's total future projected liability under the Coal Act is estimated to be at least $7,020,000.

As of the current time, Pardee has been billed for 115 former employees or their dependents. Total premiums assessed for these beneficiaries for the period ending September 30, 1998, were $1,119,900. Pardee's total projected future liability under the Coal Act is estimated to be at least $3,376,000.

Seventy-two percent of the beneficiaries assigned to Pardee are surviving spouses or dependents. Seventy-seven percent of the beneficiaries assigned to Hillman are surviving spouses or dependents. None of these persons was entitled to extended benefits from the 1950 W&R Benefit Fund at the time the amici mined coal.[13] Many of the former UMWA miners assigned to the amici worked for them for short periods of time back in the 1940's or 1950's, some for just a few months. They often worked for many other employers, frequently non-coal mining companies, for decades thereafter. They could not have rationally expected the amici to pay for lifetime retiree health benefits. Nevertheless, under the Coal Act, the amici must pay for their benefits for life, as well as lifetime benefits for their spouses and dependents, at a per person premium of $2,343.31 in 1997-98, potentially escalating each year

[13] Only 30 percent of the persons who received benefits under the Coal Act from the UMWA Combined Fund are retired UMWA miners. The remaining 70 percent are either surviving spouses or were dependents of the former miners.

thereafter. 26 U.S.C.A. § 9704(b)(2) (West Supp. 1997).

In addition, the Coal Act requires the petitioner and the amici to contribute, as necessary, for benefits for miners and relatives who were not assigned to anyone because none of the coal mining companies they worked for—or the "related persons" of those companies—remain in business. *Id.* § 9704(a)(3).[14] Under section 9704(d), an additional annual premium may be assessed against each company for its pro rata share of unassigned beneficiaries. None of the unassigned beneficiaries ever worked for either amicus or has any other connection of any kind to them. Yet by the Fund's own projections, contributions on their behalf will be required well into the middle of the next century.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals should be reversed because the Coal Act is unconstitutional as applied to the petitioner and the amici. The Coal Act violates the Due Process Clause of the Fifth Amendment because Congress could not have rationally concluded that there is any causal connection between the conduct of the petitioner and the amici and the harm sought to be redressed by the Act—the funding deficits suffered by the UMWA's 1974 Health Benefit Funds in the late 1980's and 1990's. The petitioner and the amici cannot be found responsible for causing the Funds' deficits because they did not participate in the creation of the 1974 Health Benefit Funds. Whatever else may have contributed to these deficits, the petitioner and the amici could not have contributed to them because they never promised the UMWA miners or their dependents defined or lifetime benefits.

[14] As of October 1, 1994, of the 107,049 beneficiaries of the Combined Fund, 24,787 were unassigned beneficiaries.

If the 1974 Health Benefit Funds had not promised defined benefits, they would have been free to reduce the level of benefits paid in order to maintain fiscal balance. Because the petitioner and the amici never agreed to be bound by the 1974 or later NBCWAs, Congress cannot rationally impose liability on them to pay for those benefits.

ARGUMENT

AS APPLIED TO THE PETITIONER AND THE AMICI, THE COAL ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. The Analysis of the Coal Act Under the Due Process Clause Properly Focuses on the Petitioner's Lack of Causal Connection to and Responsibility for the 1974 Health Benefit Funds' Deficits

In its petition for a writ of certiorari (the "Petition"), the petitioner reviewed the Court's recent cases discussing the Black Lung Benefits Act of 1972 and the Multiemployer Pension Plan Amendments Act of 1980. The Petition explained how in those cases the Court framed the appropriate analysis of legislation such as the Coal Act under the Due Process Clause of the Fifth Amendment. *See* Petition at 14-15.

> Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational *in the absence of any connection* between the employer's conduct and some detriment to the employee.
>
> * * * *
>
> [I]mposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 229 (1986) (emphasis added). Thus, a statute that imposes retroactive liability will violate the Due Process Clause if there is no causal connection between the harm sought to be redressed by a statute and the conduct of the party burdened by the statute.

Accordingly, the question presented in this case is whether the petitioner in any way caused the economic problem that the Coal Act was designed to solve—i.e., the funding deficits suffered by the UMWA's 1974 Health Benefit Funds in later years. If the Court finds that there is no causal connection between the petitioner's conduct and the 1974 Health Benefit Funds' deficits, then the Coal Act must be found unconstitutional under the Due Process Clause.[15] The amici agree with the petitioner that it cannot be found to have contributed to causing the Funds' financial problems for the reasons set forth below, and that is equally true of the amici.

B. The Congress Could Not Have Rationally Concluded that the Amici were Responsible for Causing the 1974 Health Benefit Funds' Deficits

The Congress could not have rationally concluded that the petitioner or the amici had any responsibility for causing the 1974 Health Benefit Funds' deficits in the late 1980's and early 1990's because the "but for" cause of those funding dificits first arose after the petitioner and the amici had stopped mining coal. As was noted above, the 1974 Health Benefit Funds began to experience revenue shortfalls in the late 1980's and early 1990's for various reasons. Yet the Court need not even consider the specific factual reasons why the 1974 Health Benefit Funds suf-

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[15] The petitioner correctly noted in its Petition that the Due Process Clause and the Takings Clause each retains distinct meaning and requires separate analysis. Petition at 22. In order to narrow the focus of this brief, the amici do not discuss the Takings Clause analysis here but rather leave that issue for the petitioner.

fered such revenue shortfalls, because those revenue shortfalls were not the "but-for" cause of the Funds' deficits. The "but-for" cause of the Funds' deficits was the fact that the 1974 and later NBCWAs promised that the 1974 Health Benefit Funds would provide defined health benefits for the UMWA miners and their spouses. If the 1974 Health Benefit Funds had not promised their beneficiaries defined benefits, they could simply have reduced benefits when they began to experience revenue shortfalls. However, once they promised defined benefits, the 1974 Health Benefit Funds were committed to paying fixed levels of benefits, which in the face of revenue shortfalls meant that funding deficits became unavoidable. *See Connolly*, 475 U.S. at 230 (O'Connor, J. concurring) (under defined contribution plans which do not specify benefits to be paid " 'there can never be an insufficiency of funds in the plan to cover promised benefits' ") (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980)).

In contrast, when the petitioner and the amici participated in the 1950 W&R Benefit Fund, that Fund was, at most, a defined contribution plan which by definition promised no defined benefits to UMWA miners. In fact, as was noted above, the trustees of the 1950 W&R Fund had total discretion to revoke or reduce the benefits in order to preserve the solvency of the Fund, and they exercised this discretion frequently throughout the 1950's and 1960's. Because the petitioner and the amici never agreed to pay the UMWA miners defined benefits and never participated in a fund that did, they had nothing to do with the funding deficit. Such a deficit would have been impossible without the 1974 Health Benefit Funds' promises to pay defined benefits. It is irrational to impose liability upon the petitioner and the amici for promises they neither made nor broke.

C. The Court of Appeals Below Erred in Concluding that the Amici Made Promises of Lifetime Benefits to the UMWA Miners

In the decision below, the Court of Appeals sought to justify Congress's decision to hold the petitioner responsible for paying the UMWA retirees' lifetime health benefits on several grounds. Most significantly, the court concluded that the petitioner and all other signatories of pre-1974 NBCWAs had "made an implicit commitment to furnish" lifetime benefits to the miners. *See Eastern Enterprises v. Chater*, 110 F.3d 150, 157 (1st Cir. 1997). Yet this conclusion lacks any factual foundation because there is no evidence that the petitioner, the amici, or other coal operators which left the industry before the 1974 NBCWA, ever promised lifetime benefits to the UMWA miners, explicitly or implicitly. All of the facts establish the opposite.

Even assuming for the sake of argument that, in addition to promising defined benefits, the BCOA promised lifetime benefits as well in the 1974 NBCWA, neither the petitioner nor the amici joined in such promises. Prior to 1974, the NBCWAs signed by the BCOA and the UMWA explicitly reserved to the trustees of the 1950 W&R Fund the right to reduce or terminate all benefits completely or change eligibility rules to drop miners from the Fund. The 1950 W&R Fund, through its written notices, repeatedly told the UMWA miners that their health benefits were not vested and could be taken away at the discretion of the trustees. Indeed, the benefits were often cut back drastically in the 1950's and 1960's when the petitioner and other operators were supposedly, according to the Court of Appeals, making this implicit promise of lifetime benefits.[16] In the face of the historical record,

[16] In the context of ERISA and the Multiemployer Pension Plan Amendments Act of 1980, this Court (Justice O'Connor concurring) specifically noted that "if a plan had regularly undergone increases and reductions in accrued benefits prior to ERISA, any contention

there is simply no way that the Congress could have rationally concluded that the petitioner or the amici created an expectation on the part of the UMWA miners that they would receive lifetime benefits.

The Court of Appeals below cited *no* historical facts to support its conclusion. In fact, it cited only three other circuit court decisions: *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996), *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997), and *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996), *cert. denied sub nom. Templeton Coal Co. v. Shalala*, 117 S. Ct. 50 (1996). Each of these three opinions in turn fails to cite any historical evidence showing that the petitioner, or any other signatory of pre-1974 NBCWAs, had made a promise of lifetime health benefits to the UMWA miners, explicitly or implicitly. *Lindsey* cited only to the House Senate Conference Committee Report that produced the Coal Act. That Conference Committee Report itself only declared in a conclusory fashion that promises had been made, without specifying when the promises had been made or who had made them. *Lindsey*, 90 F.3d at 694 (citing 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992)).

> [The] multiemployer benefit plans were created in collective bargaining negotiations between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") and perpetuated in successive bargaining agreements. Under those agreements, retirees and their dependents have been promised lifetime health care benefits.

138 Cong. Rec. S17603 (daily ed. Oct 8, 1992). The Conference Committee did not specify which collective

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that employers caused employees to rely on a promise of fixed benefits might carry even less weight." *Connolly*, 475 U.S. at 235. So too here, the fact that the trustees of the 1950 W&R Fund modified benefits frequently, including reducing them or wiping out whole classes altogether, must have prevented any expectation of lifetime benefits by the miners.

bargaining agreement promised lifetime benefits. It certainly did not state, nor could it have correctly stated, that the operators had promised lifetime benefits at any time before the 1974 NBCWA. It therefore seems that based on one conclusory remark in a Congressional Conference Committee Report, the *Lindsey* court concluded that all signatories of NBCWAs made promises of lifetime benefits.

In *Blue Diamond*, the second decision cited by the Court of Appeals below, the Sixth Circuit correctly stated that "[i]t is undisputed that the NBCWAs did not contain an explicit promise of lifetime benefits until the 1974 NBCWA agreement." 79 F.3d at 522. But for some unexplained reason, the *Blue Diamond* court decided to ignore this fact and proceeded to adopt a completely inconsistent conclusion reached by the Seventh Circuit in *Davon*: the "UMWA members had a legitimate expectation of lifetime benefits before the 1974 NBCWA based on various funds' more than 30-year history of continuous payment of benefits and the statements of coal industry officials." *Blue Diamond*, 79 F.3d at 522 (citing *Davon*, 75 F.3d at 1124-25).

The Seventh Circuit's decision in *Davon* is thus the terminus of this circular chain of reasoning. In *Davon*, the Seventh Circuit concluded that "the fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits." *Davon*, 75 F.3d at 1125. "The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s even though it is not explicit in any NBCWA until 1974." *Id.* This conclusion is utterly flawed. As was explained above, Congress made no such finding. Neither did the Coal Commission. The Coal Commission stated as a general rule that "retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working years," but it never

found that the BCOA ever promised lifetime benefits prior to the 1974 NBCWA. J.A. 245a-46a. (Coal Commission Report at 1).[17] In fact, the Coal Commission Report recognized that the Funds took away benefits from miners, such as their health cards, during difficult economic times in the 1960's and made other retrenchments to benefits. J.A. 267a (Coal Commission Report at 22) ("in 1960, the Trustees ruled that unemployed miners could only have health cards for one year and from 1962 to 1966 health cards were taken from the employees of companies with delinquent contributions").

Recognizing it was on shaky ground, the *Davon* court concluded, without reference to any document, that even if explicit promises of lifetime benefits were never made, all of the NBCWAs signed before 1974 created "a reasonable expectation of lifetime health benefits" on the part of the miners "by creating a continuous mechanism for providing UMWA multi-employer-sponsored health benefit plans. While individual coal operators such as plaintiffs have come and gone, UMWA retirees have received health coverage paid for by successive UMWA benefit trusts." *Id.* But this is a distortion of history. As was noted above, the UMWA miners were constantly told that their health benefits were not vested, and indeed those benefits were

[17] The Coal Commission must have recognized that the pre-1974 NBCWA signatories made no explicit promises of lifetime benefits, because the Commission itself recommended only that signatories to the 1978 NBCWA and thereafter should be liable for funding the UMWA miners' lifetime benefits. In its "Industry-Wide Funding Plan," the Commission recommended that "CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE [NBCWA] OF 1978 AND ANY SUCCESSOR AGREEMENT." J.A. 309a (Coal Commission Report at 63 (emphasis in original). In its consensus statement the Commission also drew a limit at the 1978 NBCWA, noting that "[c]ontribution obligations should be statutorily imposed on past signatories . . . possibly reaching back to the Signatory Class of 1978." J.A. 304a (Coal Commission Report at 58).

often cut back drastically. Thus, the *Davon* court's conclusion that the miners would have had a reasonable expectation of lifetime benefits based on the defined contribution NBCWAs signed by the BCOA and the UMWA from 1947 until 1971 is simply irrational and cannot support a finding of constitutionality. Because this faulty reasoning provides the sole foundation for the *Eastern* court's conclusion that miners were promised lifetime benefits, that conclusion must be disregarded as well.[18]

In *Lindsey*, the Third Circuit found it was irrelevant that the plaintiff coal operator "never explicitly promised lifetime benefits. . . . Congress found that the promise was implicit, and of course, Congress does not have to be correct in its beliefs—just reasonable." 90 F.3d at 694. This statement cannot be right. As a matter of simple logic and common sense, Congress cannot be found to have acted reasonably when it purports to find specific historical facts and demonstrably gets them wrong.

The Court of Appeals below purported to buttress its conclusion by referring to a hypothetical deal in which the coal operators implicitly promised the UMWA lifetime

[18] It defies common sense to think that the UMWA miners could have expected lifetime health benefits when their benefits were constantly being cut back or suspended and when they were being told regularly by written notices that the benefits were subject to termination at the discretion of the trustees. Moreover, prior to the mid-1960's few employers provided *any* health benefits to their retirees. *See* John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. Va. L. Rev. 633, 635 & n.8 (1991) (citing Education and Public Welfare Division, Congressional Research Service, Pub. IB88004, *Health Benefits for Retirees: An Uncertain Future* (1990)). Even today, the average American who receives health benefits from his or her employer has no expectation of lifetime benefits, barring an explicit promise of lifetime retiree health benefits from the employer. At most, the average worker who is fortunate enough to receive health benefits from his employer expects to receive them only while employed by that employer.

benefits and the UMWA promised in return to accept mechanization of the mines. *See Eastern Enterprises*, 110 F.3d at 157 (stating that the 1950 NBCWA "created a welfare and retirement fund in consideration for workers' acquiescence in the automation of the mines").[19] Nevertheless, the Court of Appeals' description of a mechanization-for-life-time benefits-deal is pure Coal Act mythology. The historical record is clear that UMWA President John L. Lewis supported mechanization of the mines as early as 1920 in order to improve miners' wages. Thus, the coal operators had no need to promise anything like lifetime benefits in order to induce the UMWA to accept mechanization.[20]

Instead, the historical record shows that a different deal was struck in the 1950 NBCWA. Coming off the protracted strike of 1949, the operators received assurance that the union would respect their right to control their facilities and would not encourage wildcat strikes by invoking the "willing and able" provision found in the 1948 NBCWA. In return, the operators agreed to cooperate with the union in administering the welfare and retirement fund and consented to the appointment of John L. Lewis' ally, Josephine Roche, as the neutral trustee—thus assuring UMWA control over the trust. *See* Melvyn Dubofsky and

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[19] To support this supposed historical fact the Court of Appeals below cited only the decision of the Fourth Circuit in *Holland v. Keenen Trucking*, 102 F.3d 736, 741 (4th Cir. 1996). The *Holland* court stated that "the 1950 UMWA Plan was instituted in exchange for the UMWA's acquiescence in the mechanization of the mines" but cited no historical evidence to support this assertion. *Id.* at 741.

[20] In fact, as far back as 1920, it was noted that " 'the United Mine Workers have always been favorable to and have never opposed the introduction of machinery or labor-saving machinery in the operation of mines.' " Keith Dix, *What's a Coal Miner to Do? The Mechanization of Coal Mining* (1988) at 133-34. UMWA President John L. Lewis not only favored the use of mine mechanization technology, but believed it was the key to the long-run stabilization of the whole industry. *Id.* at 161.

Warren Van Tine, *John L. Lewis: A Biography* (1977) at 489; Robert H. Zieger, *John L. Lewis, Labor Leader* (1988) at 155-56.

D. The Amici Did Not "Dump" Any Obligation to Pay Lifetime Benefits to UMWA Miners Upon Leaving the Industry in 1959 and 1963

Several circuit courts have concluded that the petitioner and other super-reachbacks should be liable under the Coal Act because on leaving the industry they "dumped" their purported obligations to pay the UMWA miners' lifetime benefits, leaving the remaining BCOA companies to pick up the tab. This conclusion is factually erroneous. First, at the time the petitioner and the amici left the industry the miners had no right to lifetime or any other defined benefits—thus, there was no burden of lifetime or any other defined benefits to dump onto the BCOA. Second, when each NBCWA terminated, the continued provision of health care benefits depended on the negotiation and signing of a new NBCWA. During negotiations for each new NBCWA, the BCOA was not forced to continue to provide benefits for the miners. Rather, even knowing full well that former operators such as the petitioner and the amici would no longer be making contributions, the BCOA (in exchange for concessions by the UMWA which provide no benefit to the super-reachbacks) voluntarily agreed to pay health benefits for employees who had already retired and never even approached the departed operators for additional contributions.

Not only was the BCOA legally entitled unilaterally to stop providing benefits to retired UMWA miners,[21] but it was not forced to transform the limited scope of the 1950

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[21] As a legal matter, because provision of health benefits to retirees is a permissive rather than a mandatory subject of bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151-169, the UMWA could not strike even if the BCOA unilaterally decided it would no longer fund retiree benefits.

W&R Fund into the contractual equivalent of universal health coverage for retired miners, their surviving spouses, and their dependents. To this end, decades after the petitioner and the amici had stopped mining coal, the BCOA, but not the petitioner or the amici, voluntarily agreed to: 1) provide to miners and certain dependents a "Health Service card for life;" 2) expand the class of beneficiaries to include widows and dependents of retirees; 3) guarantee sufficient contributions to pay for the newly defined benefits; 4) authorize an increase in the rate of contribution whenever necessary to avoid funding shortfalls; and 5) commit signatory employers continuing in the coal business to continue to make contributions as specified in future contracts. In exchange for each of those new concessions on health care, the BCOA—but not the petitioner or the amici—presumably obtained concessions from the UMWA which were of benefit to its member companies' coal mining operations. Thus, instead of blaming the petitioner or other super-reachbacks for dumping non-existent obligations, the courts should have recognized that the BCOA voluntarily assumed new, drastically expanded obligations long after the petitioner and the amici had ceased mining coal.

E. The Fact that the Petitioner and the Amici May Have "Profited from the Labor of Miners" Does Not Justify Imposing Retroactive Liability Under the Coal Act

Certain circuit courts have concluded that it is rational to impose Coal Act liability upon the super-reachbacks because they purportedly profited from the labor of miners while they were engaged in mining. *See In re Blue Diamond Coal*, 79 F.3d at 523. This conclusion completely ignores the fact that while the super-reachbacks may have "profited" from the labor of their miners at the time they mined coal, they paid the miners wages and benefits for their labor, thus fulfilling any economic obligation that they might have had to them. Moreover, according to this rationale, Congress could impose Coal Act liability on

anyone in the United States, because every person in the national economy benefited from coal in some way—whether for heating homes, fueling electric utilities, or powering railroad travel. The infinite reach of the rationale proves its absurdity.

Finally, that argument overlooks the fact that many of the UMWA miners assigned to the super-reachbacks, such as the petitioner and the amici, worked for them for only short periods of time early in their careers before proceeding to work for other employers. If the petitioner and the amici are to be taxed for profiting from the labor of the miners early in their career, why shouldn't the miners' subsequent employers also be taxed? The fact that there is not a good answer to this question again reveals the absurdity of the "profited from their labor" rationale.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ARTHUR NEWBOLD
(Counsel of Record)
ETHAN D. FOGEL
ANDREW S. MILLER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-4000
Counsel for Amici Curiae

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OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

CLIFFORD M. SLOAN
Counsel of Record
PAUL L. JOFFE
MEREDITH FUCHS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for Amicus Curiae

January 20, 1998

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BRIEF OF *AMICUS CURIAE* BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS

The Bituminous Coal Operators' Association, Inc. ("BCOA"), respectfully submits this brief as *amicus curiae* in support of respondents.[1]

INTEREST OF *AMICUS CURIAE*

The BCOA is a multiemployer collective bargaining association that has represented numerous large and small coal companies in negotiations with the United Mine Workers of America ("UMWA") for almost fifty years. Since 1947, the collective bargaining agreements, known as National Bituminous Coal Wage Agreements ("NBCWA's"), have provided for the maintenance of health and pension benefit trust funds for coal production employees.

For decades, BCOA employers have paid the health care costs of their employees and retirees. Until Congress passed the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 (the "Coal Act" or "Act") (codified at 26 U.S.C. §§ 9701-9722), BCOA employers and other signatories to the NBCWA's also bore, by themselves, the significant, additional cost of financing the health care benefits of over 80,000 retired employees of other coal companies that had abandoned the health care funds, left the coal industry, or gone out of business. In 1991, the employees of other companies, and their dependents, represented 70-

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

75% of the beneficiaries of the health care funds.[2] By the time the Coal Act was passed, the BCOA and other NBCWA signatories making contributions to the Funds had shrunk from those producing 80% of the nation's coal in 1950 to those producing only 30% of the nation's coal in 1990, and the cost of financing the health benefits for other companies' employees had grown enormously. Joint Appendix ("JA") 246a.

After considering the findings of an Executive Branch Commission and conducting hearings, Congress and the Executive Branch reached a bipartisan solution to the coal miners' health fund crisis. The legislation places the cost of financing health benefits on the present and former NBCWA signatory employers for whom the beneficiaries worked. This case challenges the constitutionality of assessing liability on a company to finance the health benefits of its former employees.

The current BCOA member companies always have accepted responsibility for the funding of health care plans for their current and former employees. If the Coal Act is struck down, however, a new crisis will be precipitated. The effect on the industry of a new round of abandonment of retirees by their former employers cannot be overstated; the entire system for funding promised health care for retired miners will be placed in jeopardy, and the stability of coal production and employment will be at risk.

Moreover, until the passage of the Coal Act, the BCOA was a settlor of the miners' health care funds, and the BCOA participated in selecting the trustees of the funds. Under the Coal Act, the BCOA participates in selecting trustees for the benefit funds created by the Act, and is a settlor for one of those funds. 26 U.S.C. §§ 9701(b)(2), 9702(b), 9712(a)(1).

Accordingly, the BCOA has a direct and substantial interest in the case before the Court.

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[2] GAO, "Retired Coal Miners' Health Benefits," GAO/HRD-92-130FS at 8-9 (July 22, 1992) ("GAO Report").

INTRODUCTION AND SUMMARY OF ARGUMENT

The Coal Act is based on a simple principle—"pay-for-your-own." The *only* issue presented by this case is the obligation of a former coal employer to contribute to the health care costs of its retired employees (and their survivors and dependents). Although the Coal Act includes a contingent obligation, after other funding sources have been exhausted, to contribute to the health care costs of employees whose former employers no longer exist (and although amicus is confident of the constitutionality of that provision as well), that contingent obligation never has been triggered, and is not ripe for review. Even more specifically, moreover, in this company-specific substantive due process and takings challenge, the only issue is the obligation imposed on petitioner Eastern Enterprises ("Eastern"), under the "pay-for-your-own" principle, to pay for its own former employees.

At bottom, Eastern's position is that it has constitutional immunity from any requirement that it contribute to the health care costs of its former employees, and that it has a constitutional right to have *others* shoulder the health care costs for its former employees—either the remaining BCOA employers, who always have paid for their own and continue to do so; or other coal employers, who never reaped the benefits of the labor of Eastern's employees; or the miners and their families themselves, almost fifty years after they first received health care benefits in a historic agreement.

The Executive Branch and the Legislative Branch reached a different conclusion, however, about the allocation of responsibility for Eastern's former employees—a conclusion that is, at a minimum, rational and constitutionally permissible. Eastern contends that it has a constitutional shield protecting it from an obligation to "pay-for-its-own"—and that the Judicial Branch should override the considered judgment of the Executive Branch and the Legislative Branch on this matter of complex economic regulation. Indeed, petitioner rests its entire plea

to this Court—as it must—on the anomalous proposition that this Court should find that a blue-ribbon Executive Branch Commission, Congress, and the Executive Branch were mistaken in their factual analysis of the crisis in the coal industry and of the promised health benefits. Neither substantive due process nor the Takings Clause, however, compels this bizarre result, and petitioner's challenge falls far short of establishing that the Judiciary should invalidate this important legislation.

First, Congress and the Executive Branch faced a severe problem in the coal industry in the early 1990's. After careful reflection and extensive consideration of evidence, they reached the conclusion reflected in the Coal Act—namely, that "pay-for-your-own" is a reasonable, fair, and appropriate response to the dire situation of retired coal industry employees and their families. This conclusion is, at the very least, rational and well within the bounds of permissible governmental options.

Second, in any event, petitioner is particularly ill-suited to be raising claims of unconstitutional irrationality or unfairness. Petitioner continued to reap lucrative benefits from its wholly-owned BCOA subsidiary well into the 1980's, and actively participated in the conduct of its affairs. Indeed, petitioner's own senior corporate officers *simultaneously* served as President of petitioner's subsidiary during much of the 1970's and 1980's, at the very time that petitioner's subsidiary participated in the BCOA and ratified the NBCWA's in the 1970's and 1980's for which petitioner repeatedly emphasizes that it bears no responsibility. Petitioner's attempted self-characterization as a company that left the scene decades ago (which would not in any event suffice to establish unconstitutionality) thus is simply contrary to fact.

In the final analysis, Congress and the Executive Branch adopted a simple principle of "pay-for-your-own." Eastern's position that it has a constitutional entitlement to have others pay for its own has no basis in the Constitution.

ARGUMENT

I. CONGRESS' REQUIREMENT THAT COAL COMPANIES PAY FOR THEIR OWN IS RATIONAL AND PERMISSIBLE

In the early 1990's, the federal government faced a crisis in the coal mining industry. The former employers of many retired coal miners (who had been receiving health care benefits for over four decades) had stopped contributing to the health care programs; the enormous cost of the retirees' health care was thrown on to a dwindling number of BCOA and other NBCWA signatory employers; the solvency of the historic miners' health care system was in jeopardy; and disruption of the coal industry, threatening the U.S. economy, loomed. A broad-based Executive Branch Commission determined that affected employees had been given a promise of lifetime benefits and suggested possible statutory alternatives to address the financial crisis; Congress and the Executive Branch ultimately enacted the "pay-for-your-own" approach of the Coal Act. This governmental response was rational and permissible, and neither substantive due process nor the Takings Clause compels its judicial invalidation.

First, contrary to petitioner's contention, the Coal Commission, Congress, and the Executive Branch acted fairly and reasonably in responding to the financial crisis in the coal miners' health care plans. Second, also contrary to petitioner's contention, neither substantive due process nor the Takings Clause supports judicial invalidation of the Coal Act.

A. The Federal Government Responded To A Crisis In The Coal Industry Health Care Plans

At the time the Coal Act was passed, the federal government was faced with a crisis that threatened to reverberate throughout the coal industry and the American economy. The health benefit trust funds that had provided retired UMWA miners with health care coverage for over forty years were on the brink of bankruptcy. Over 120,000 retired miners, widows, and survivors de-

pended on the trust funds for coverage, and the funds' looming insolvency threatened severe disruptions in the coal industry. JA 247a, 289a, 292a-293a.

The federal government addressed this serious problem, first, through an Executive Branch Commission and then, through Congressional and Executive Branch consideration of governmental options. This process ultimately led to adoption of the "pay-for-your-own" principle in the Coal Act. The activities and analysis of the Coal Commission, and of Congress and the Executive Branch, highlight the fairness and reasonableness of the "pay-for-your-own" principle. Congress and the Executive Branch permissibly determined that requiring former employers to contribute to the health care costs of their own former employees was an appropriate response to the miner health care crisis.

1. The Coal Commission—The Executive Branch's Coal Commission was appointed in 1990; it comprehensively considered the rapidly deteriorating situation in retired coal miners' health care funds.

The funds' precarious financial situation had become pronounced in the late 1980's. By 1988, surplus funds had been exhausted and the trust funds began to run a deficit. The growing tension in the coal industry over the financial plight of the health benefit trust funds crystallized during a ten-month long strike against the Pittston Coal Company in 1989. During negotiations concerning the 1988 NBCWA, Pittston had told the UMWA that the company no longer intended to contribute to the trust funds and terminated benefits to 1700 retirees for whom Pittston directly paid health care benefits. *Coal Commission Report on Health Benefits Of Retired Coal Miners: Hearing Before the Subcomm. On Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 40 (1991) (hereinafter "*Senate Finance Committee Hearing*"). "The payment of health care benefits to retired and disabled miners . . . was a major issue in the strike." JA 247a (Coal Commission Report). The Pittston strike

"threatened the stability of coal production as well as the economies of coal-producing states." *Davon Inc. v. Shalala*, 75 F.3d 1114, 1118 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *see also, e.g.*, 135 Cong. Rec. S12312 (daily ed. Oct. 2, 1989).

Secretary of Labor Elizabeth Dole became involved in settling the strike. In the wake of the settlement, in March 1990, she appointed a blue-ribbon, expert panel to consider this growing problem—the Advisory Commission on United Mine Workers of America Retiree Health Benefits ("the Coal Commission"). Secretary Dole charged the Commission with analyzing and making recommendations concerning the "financial crisis" of coal miners' health care plans and the effect of these issues on the coal industry as a whole. *Senate Finance Committee Hearing* at 257 (App. 7 to Coal Commission Report).

The 11-member Coal Commission was broadly based. Its members reflected "a wide range of experience," and "represent[ed] all facets of the coal industry." JA 249a. Coal Commission members were drawn from "[t]he union"; "coal operators—both BCOA and non-BCOA"; the "private insurance industry"; "academics"; "medical and government policy experts"; and "those with extensive experience in labor law, mediation, and labor negotiations." *Id.* Its Chairman was respected federal mediator and former Secretary of Labor William Usery, and its Vice Chairman was Villanova Law Professor Henry Perritt.

The Commission sought broad public input. It held six public meetings, which were announced in advance in the Federal Register, at which members of the public were invited to offer their views. Indeed, the Commission heard the testimony of eighteen witnesses and received written statements from an additional twenty-nine individuals and organizations, representing the full spectrum of the coal industry. In November 1990, the Commission issued its report, documenting the financial crisis of the benefits trusts, explaining the factors that had led

to the financial instability, and recommending solutions to the problem. JA 231a; *Senate Finance Committee Hearing* at 269 (App. 8 to Coal Commission Report).

a. The Commission's Analysis and Recommendations—In summarizing its findings, the Commission succinctly stated, "the combination of skyrocketing health care costs, an increasing number of retirees who have been abandoned by their employers, and a smaller percentage of coal producers making contributions to the UMWA Funds have put the health care program for retirees in a financial crisis." JA 236a. By 1993, the Commission emphasized, the Funds would face a deficit of $300 million. *Id.*

The Coal Commission recognized that the financial crisis was the result of a "convergence of numerous forces both in the coal industry and in health care." JA 287a. The Commission stressed that a dwindling number of companies was being called on to support the health benefits of so-called "orphan" employees, whose former employers were not contributors to the health care funds. NBCWA signatory employers, in contrast—such as the members of the BCOA—paid for their own. As the Commission explained:

> How to continue to provide health benefits to 'orphans' is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem.

JA 236a.

The Commission particularly emphasized its finding that retired coal miners and their families had been given a reasonable expectation of lifetime benefits:

> Retired coal miners have legitimate expectations of health care benefits for life; *that was the promise they received during their working lives, and that is how they planned their retirement years.* That commitment should be honored. But today those expectations and commitments are in jeopardy.

JA 245a-246a (emphasis added).

The Commission also explained that "[h]ealth care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits," which now were in jeopardy. JA 236a. The Commission also observed that coal operators and the miners entered "a concordat . . . that the Fund would move forward and the operators would be able to mechanize their mines." JA 265a.

The Commission explained that it had reached consensus "on a number of important issues." *First*, and perhaps most importantly, "[t]he Commission *firmly* believes that the retired miners are entitled to the health care benefits that were promised and guaranteed them and that such commitments must be honored." JA 237a. (emphasis added). *Second*, "[t]he Commission agrees that a statutory obligation to contribute to the plans should be imposed on current and former signatories to the National Bituminous Coal Wage Agreement." *Id.* *Third*, "[t]he Commission agrees that mechanisms must be enacted to prevent future dumping of retiree health care obligations on the Funds." *Id.* The Commission noted that it had disagreement on one "principal substantive point"—whether the obligation to pay for abandoned employees should be spread to all coal mining companies (including, not only the companies that had stopped paying for employees, but also those who never had been signatories to union agreements at all), or whether it should be imposed simply on the former em-

ployers for their own employees. Accordingly, the Commission recommended both approaches as alternatives.[3]

b. The Background Of The Financial Crisis—The Commission also analyzed the background of the 1990's coal health care funding crisis. It explained that the history could be grouped in five stages: (1) the establishment period (1946-50); (2) the development period (1950-60); (3) the retrenchment period (the 1960's); (4) the transition period (the 1970's); and (5) the "period of crisis" (the 1980's-90's). Four factors had been present in each period: the collective bargaining process; government involvement; health care delivery; and industry developments. JA 259a-260a.

(i) *The Establishment Period*—As the Commission explained, the coal miners' health care plans were created in 1946. After a bitter coal strike, President Truman seized the mines under the authority of the War Labor Disputes Act, 11 Fed. Reg. 5593 (1946), and, after negotiations between Secretary of the Interior Julius Krug and UMWA President John L. Lewis, an agreement was reached that established a miners' health care benefit system. In 1947, as the federal government's one-year control of the mines was reaching its end, the BCOA and the UMWA signed the 1947 NBCWA, in which the signatories agreed to transfer the health care funds into a single trust known as the 1947 UMWA Welfare and Retirement Fund. Recurrent labor unrest over implementation of the 1947 Fund ensued, however, and various government representatives sought to help resolve the difficulties. JA 261a-264a.

[3] One of the Coal Commission's alternatives simply applied to past signatories. JA 312a, 313a ("this plan seeks additional revenues from a broadened base of current and past signatories to the contracts, establishing and providing revenues for the Benefit Funds"; "[l]egislation will be enacted requiring past signatories to contribute to Benefit Funds on an equitable basis."). The industry-wide alternative, in contrast, consisted of: (1) an industry-wide orphan fee, and (2) contributions from signatories to the current NBCWA or the 1978, 1981 and 1984 NBCWA's for their former employees. JA 307a. Contrary to petitioner's suggestion, one Coal Commission alternative thus applied to past signatories without limitation. Even if it did not, moreover, the Commission's factual analysis of the historical situation and circumstances supports a rational basis for the "pay-for-your-own" approach later adopted by Congress. *See* pp. 11-18, *infra*.

(ii) *The Development Period*—The difficulties in the late 1940's were resolved by the 1950 NBCWA, in which the BCOA and the UMWA agreed to create the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund"); that fund succeeded to the assets and liabilities of the 1947 Fund. As the Commission found, the 1950 agreement had two important underpinnings—(1) the Fund would be permitted to continue with its mission of providing health care to miners and their families, and (2) the coal mining industry, in turn, would be permitted to mechanize and modernize. JA 265a.

(iii) *The Retrenchment Period*—Financial difficulties caused the Fund to make adjustments in the 1960's. JA 267a-268a.

(iv) *The Transition Period*—During the 1970's, the Commission explained, several developments produced changes in the operation of the Fund. *First*, the number of employers contributing to the Fund declined; various companies left the NBCWA process for various reasons, and mines in the western United States grew in importance, operating outside the NBCWA system. *Second*, as miners who had labored under the NBCWA system aged and retired, the costs grew. *Third*, significant legal changes developed. Congress enacted the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, which required restructuring the health and benefit plans into separate funds for health and for pension benefits; a judicial decision, moreover, imposed the unanticipated addition of 19,000 retired miners and thousands of their dependents to the Fund. When an attempt was made to reduce medical benefits, labor unrest again

swept the industry. As the Commission concluded, severe pressures and tensions thus began to emerge in the funding of coal mining health care plans. JA 269a-271a.

The 1978 NBCWA accordingly reflected this evolution. The multiemployer 1950 Benefit Plan and Trust would continue to pay for employees who had retired prior to January 1, 1976. The multiemployer 1974 Benefit Plan and Trust would pay for workers who had retired on or after January 1, 1976, but whose employers no longer contributed. JA 269a. If the post-1975 retiree's employer was an existing NBCWA employer (such as a BCOA member), the employer would provide for its retirees through an individual company plan, rather than, as in the past, through a multiemployer fund. JA 271a.

The 1978 bargaining agreement included a so-called "guarantee clause" and an "evergreen clause." Under the "guarantee clause," the signatory employers "agree[d] to fully guarantee the pension and health benefits provided by the" 1950 and 1974 benefit trusts "during the term of this agreement." *See, e.g.*, RA 787-88, 827-28.[4] In order to fully fund the benefits, the "evergreen clause" required employers whose employees participated in the benefit plans to "mak[e] the contributions required under the [current] National Bituminous Coal Wage Agreement . . . as amended from time to time, and any successor agreements thereto." *See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 471-72 n.1 (D.C. Cir. 1993). These clauses were retained in substantially the same language in subsequent agreements. JA 111a; RA 787-88, 827-28.

(v) *Period of Crisis*—A crisis developed during the 1980's—what the Commission termed "a struggle for Fund survival." JA 272a. NBCWA tonnage declined dramatically as companies chose not to sign the NBCWA;

[4] Citations to "RA" refer to the Joint Appendix submitted to the Court of Appeals, which has been lodged with the Court.

medical costs soared astronomically; and judicial decisions continued to add thousands of miners to the fund. As the Commission found, NBCWA employers (including the BCOA) were faced with the prospect of what the Commission termed a "last man's club"—a tremendous economic incentive to abandon the fund (and one's own former employees), lest one be left "holding the bag" with enormous unfunded liabilities for *other* companies' employees. The 1984 and 1988 NBCWA Agreements could not resolve these basic structural deficiencies. Additional companies, moreover, failed to renew their participation in the NBCWA system after the expiration of each contract. Accordingly, the Commission concluded, the government faced the very real prospect of the bankruptcy and abandonment of the funds—a development that would have profound consequences for the miners and their families, as well as the nation as a whole. As the Vice Chairman of the Commission stated, "[w]hen the present system falls apart there will be instability, not only in the organized part of the industry but in the coal industry generally," JA 322a; as the Commission emphasized, moreover, coal remains a "cornerstone of our national energy supply." JA 253a.

After a careful consideration of almost five decades of coal mining health care plans, the Secretary of Labor's expert Commission thus reached several critical conclusions: First, NBCWA coal miners and their families had legitimate expectations of lifetime health care benefits. Second, the NBCWA health care funds were threatened with financial disaster. Third, the disaster had been caused by a situation in which numerous former NBCWA signatories no longer contributed, thus leaving an enormous burden on the plan as a whole and on those employers who were willing to pay for their own, but unwilling to shoulder alone the burden of other companies' former employees. And fourth, a federal governmental solution was appropriate and imperative. JA 236a-237a. The Coal Commission's report and findings themselves thus establish a fair and reasonable basis for a "pay-for-your-

own" approach, even though that was not the only statutory alternative suggested by the Commission and even though such a report and findings plainly are not a constitutional prerequisite for the validity of legislation. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993).

2. Congress And The Executive Branch—In the wake of the Coal Commission's report, Congress and the Executive Branch undertook their own thorough consideration of the ongoing crisis in coal health care plan financing. Ultimately, they reasonably agreed to the "pay-for-your-own" solution reflected in the Coal Act.

Congress first conducted hearings to consider the Commission's findings and recommendations. The Senate Finance Committee heard testimony from a wide variety of interested persons—various Coal Commission members; individual miners and their dependents; coal companies that were no longer NBCWA signatories; coal companies that never had been NBCWA signatories; representatives of the BCOA; the President of the mine workers' union; and experts from academia. Individual beneficiaries testified about the importance of their expectations of health care benefits. Analysts testified that coal companies that no longer contributed to health care benefits for former employees had contributed to the problem by producing expectations and then refraining from contributing. Others opposed this view. Some recommended an industry-wide tax; some recommended a "pay-for-your-own" approach; some recommended neither. Congress thus had an opportunity to consider the views of all interested persons concerning the causes and problems of the health care plan crisis, and possible responses to it. *See Senate Finance Committee Hearing* at 4-7, 9-20, 23-30, 39-42, 43-45, 46, 325-26.

The need for congressional action was made apparent to Congress during the hearings. The health care funds had a projected 1993 deficit of $300 million. Although

the BCOA and other NBCWA employers were paying for their own former employees, they could not sustain the cost of signing a new collective bargaining agreement in 1993 (when the 1988 NBCWA expired) that placed the expense of other companies' employees on their shoulders.[5] Over 120,000 elderly beneficiaries would be left without benefits that they expected and had relied upon[6]; and there would be extreme labor unrest, threatening the national economy, if the medical program unraveled.[7]

An initial legislative response was ultimately unsuccessful. In March 1992, Congress passed legislation that generally would have imposed an industry-wide, per-hour tax on bituminous coal production to fund health care benefits for retired orphan miners. Opponents of the bill argued that it inappropriately placed responsibility on companies that never had been part of the NBCWA process. Senator Wallop, for instance, vigorously objected that "companies that did nothing to create this problem are being asked to foot the bill for [companies that did]," and that "those who had nothing to do with it are now forced to pay." 138 Cong. Rec. S3433, S3435 (daily ed. Mar. 12, 1992). Senator Boren emphasized, moreover, that it was not the miners themselves, who were responsible for the funding crisis: the "retired workers . . . are the innocent victims of the process that was established." *Id.* at S3434. The Bush Administration also expressed its opposition to an industry-wide tax approach. *See* 138 Cong. Rec. S17633 (daily ed. Oct. 8, 1992) (Sen. Rockefeller).

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[5] *Senate Finance Committee Hearing* at 19 (Henry H. Perritt, Jr., Vice Chairman of the Coal Commission); *id.* at 45 (Michael K. Reilly, Chairman, BCOA); *see also* 138 Cong. Rec. S3441 (daily ed. Mar. 12, 1992) (Sen. Rockefeller).

[6] *Senate Finance Committee Hearing* at 4-5 (Dixie Woolum); *id.* at 5-6 (Homer Eckley); *id.* at 47-48 (Richard L. Trumka, President, UMWA); *see also* 138 Cong. Rec. S10784 (daily ed. July 29, 1992) (Sen. Specter).

[7] 138 Cong. Rec. S3645 (daily ed. March 13, 1992) (Sen. Ford).

Ultimately, the legislation, which was part of a larger tax bill, was vetoed when the larger tax bill was vetoed.

Throughout the spring of 1992, the Senate continued to consider the issue. Senators requested a report from the General Accounting Office that analyzed various factors relating to proposed legislation regarding financing health benefits for retired coal miners. The GAO Report carefully documented the continuing and accelerating crisis in the health care funds. GAO Report at 19-31.

In the summer of 1992, Congress and the Executive Branch reached agreement on the "pay-for-your-own" proposal reflected in the Coal Act. Senator Rockefeller explained that, "[i]nstead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies. [Under this legislation they] would pay for their own retirees." 138 Cong. Rec. S10783 (daily ed. July 29, 1992). Senator Wallop agreed, stating "that the resolution . . . is as fair as we could possibly make it." *Id.* at S10784. Senator Byrd likewise emphasized that the Coal Act requires retired miners' benefits to be provided by "those companies that are now or formerly were signatories to a [NBCWA]. It is these companies that made the promise of health benefits to their workers, and it is appropriate that these companies be collectively asked to provide these benefits." *Id.* Senator Ford, who had opposed the earlier legislation, now expressed his support and emphasized that, unlike the previous legislation, "the funding mechanism for paying for these benefits [does] not include a new tax on coal companies that were never a part of this problem." *Id.* at S10785. The Executive Branch, which had opposed the earlier legislation, supported the "pay-for-your-own" approach. *Id.* at S10783.

The legislative discussion of the statutory alternatives particularly emphasized five central points. First, the Act was necessary to prevent severe hardship to individual

miners and their families.[8] Second, the Act was necessary to prevent tremendous upheaval in the coal industry, and the national economy generally, when the NBCWA expired in early 1993.[9] Third, simply leaving the payment obligation on the BCOA and NBCWA employers, without further action, was unfair and impracticable, both because the funding base was too limited, and because these employers themselves could abandon the funds, as others had done, and severely worsen the "last man's club" phenomenon.[10] Fourth, as the Coal Commission had

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[8] *See, e.g.*, 138 Cong. Rec. S10784 (daily ed. July 29, 1992) (Sen. Specter) (referring to "the tremendous anguish of the retirees from the coal industry" and "the kinds of problems that they were sustaining"; "It is especially tragic because they had expected to have benefits to have protected them from the ravages of aging, and the ravages of the need for medical care"); *id.* at 10785 (Sen. Ford) (legislation ensures that the beneficiaries "d[o] not lose their much needed health care benefits, nor have them interrupted"); *id.* at S10787 (Sen. Simon); *id.* at S3436 (daily ed. March 12, 1992) (Sen. Rockefeller) (miners "have sacrificed their lungs, their limbs, their lives, their health, in doing what is the most dangerous work under God's Earth"); 138 Cong. Rec. H11413 (daily ed. Oct. 5, 1992) (Rep. Rahall).

[9] *See, e.g.*, 138 Cong. Rec. S3585 (daily ed. March 13, 1992) (Sen. Byrd) (cutoff of benefits could lead to "widespread labor unrest . . . in the Nation's coal fields," with millions of dollars in losses and a "recipe for disaster" that could send the economy into "a further downward spiral").

[10] *See, e.g.*, 138 Cong. Rec. S3440 (daily ed. March 12, 1992) (Sen. Rockefeller) ("the BCOA and the . . . companies that it represents is not only paying for all of its own retirees, which represent 25 percent of the 120,000 [beneficiaries], but it is paying for all of the rest of them too . . . . Well, the BCOA has been paying for them because of the contract, but, guess what? The contract ends next February 1, 1993, and that is going to be the end of that arrangement. They are not going to make that agreement anymore, because they do not have to sign it, and they will not. . . . The BCOA will take care of its own people. That will be 25 percent of all of these retirees. But what about all the rest of them? They are going to be nowhere, out in the street, no help. That is the point. That is why this is a crisis."); *id.* at S3441 (Sen. Rockefeller) (BCOA employers "have been paying $1 for

found, miners and their families had received promises of lifetime health care benefits (and the companies they worked for had benefited from the miners' labor and the health care program).[11] And, fifth, the "pay-for-your-own" principle was an appropriate response to this serious problem.[12]

The Senate passed the legislation on July 30, 1992, as part of the Energy Policy Act of 1992; the Conference Committee agreed to the Senate language; the House agreed to final passage of the conference bill on October 5, and the Senate agreed on October 8, 1992; and President Bush signed the legislation on October 24, 1992.

The Coal Act represents a fair and reasonable response to the crisis in coal miners' health care funds. As Senator Rockefeller explained, "[t]he shrinking funding base and spiraling costs ma[d]e the continuation of the old program unworkable. The legislative task has been to assign responsibility for funding in the best way possible, realizing that there is no perfect solution. . . . [The Act] is within the scope of the basic alternatives recommended by the Dole Commission." 138 Cong. Rec. S17633 (daily ed. Oct. 8, 1992).

The new funding obligations apply only to miners who retired before September 30, 1994. As Senator Ford stated, "[w]e have closed the new orphan fund . . . to

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their own retirees and $3 for everybody else's. Ordinarily, in business one does not do that for a very long time."); *id.* at S3645 (Sen. Ford) ("this is a burden that the remaining signatory companies can no longer bear").

[11] *See, e.g.*, 138 Cong. Rec. S10782 (daily ed. July 29, 1992) (Sen. Rockefeller) ("Everyone acknowledges that these elderly people deserve their health care coverage. . . . As former Secretary of Labor Dole's Coal Commission said very simply, the commitment to health care benefits should be honored."); *id.* at S10783 (Sen. Rockefeller); *id.* at S10785 (Sen. Wofford); *id.* at S10783 (Sen. Byrd).

[12] *See, e.g.*, 138 Cong. Rec. S10782-10785 (daily ed. July 29, 1992) (Statements of Sens. Rockefeller, Byrd, Wallop, Specter, and Ford); *see also* pages 15-17, *supra*.

limit the problem and ensure a long-term solution." 138 Cong. Rec. S10785 (daily ed. July 29, 1992).[13]

With regard to health care plan miners who retired before September 30, 1994, and whose employers are still in business, the Act adopts a three-step approach. *First*, liability is assigned to a former employer who was a signatory to a 1978 NBCWA or later NBCWA *and* was the most recent to employ the employee for at least two years. *Second*, if there is no employer in the first category, liability is assigned to a former employer who was a signatory to a 1978 NBCWA or later NBCWA *and* was the most recent to employ the employee. *Third*, if there is no employer in the first or second category, liability is assigned to the former employer who employed the miner for the longest period of time. 26 U.S.C. §§ 9706(a)(1)-(3). Thus, the Act imposes liability on pre-1978 employers only if no other employer is available to contribute.

With regard to health care plan miners who retired before September 30, 1994, and whose employers are no longer in business at all, the Act likewise establishes a tiered approach. It transfers $210 million from the miners' pension fund, which had been created by contributions from BCOA members and NBCWA signatories, to support these beneficiaries and pay related costs; it likewise transfers millions of dollars from the interest on the abandoned minelands fund to support these abandoned employees. 26 U.S.C. § 9705. If those funding sources fall short, proportionate liability will be imposed on all contributors to the fund. No such liability ever has been imposed.[14]

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[13] The Coal Act created two new trust funds to provide health care benefits to retired miners and their dependents. The Combined Fund merged the 1950 and 1974 Benefits Trusts to provide benefits to coal industry retirees who were eligible as of July 20, 1992, to receive and were receiving benefits from the 1950 Benefit Trust or the 1974 Benefit Trust. The UMWA 1992 Benefit Plan, in turn, services eligible employees who retired between July 20, 1992 and September 30, 1994, and whose last signatory employer is not providing them with health benefits.

[14] See RA 1906-1907; Pet. Br. at 15-16 n.32. As a result of the "pay-for-your-own" principle in the Coal Act, the class of "orphans"

With the coal miners' health care funds on the brink of financial disaster—threatening to deny miners and their families promised health care and threatening to engulf a critical national industry in turmoil and upheaval—Congress and the Executive Branch thus fashioned a governmental solution based on a principle of "pay-for-your-own"; liability was imposed on a universe of companies that, in the government's considered view, bore a significant relationship to the medical benefit program and the financial crisis confronted by Congress, the Executive Branch, and the country. This governmental response to a complex economic problem was fair and reasonable, and well within the government's permissible discretion.

B. The Solution Crafted By Congress And The Executive Branch Does Not Violate Substantive Due Process Or The Takings Clause

It is well-settled that this Court will invalidate an Act of Congress only for "the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (internal quotation marks omitted). Petitioner's challenge falls far short of establishing such a basis for invalidating the Coal Act.

1. Substantive Due Process Does Not Require Invalidating The Coal Act—The Coal Act allocates economic rights and responsibilities between employers and employees in the coal industry. This Court repeatedly has emphasized that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality," and that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 637

—former employees without a contributing employer—is dramatically smaller than the "orphan" class considered by the Coal Commission.

(1993); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Under this deferential standard, a rational statutory scheme will survive judicial review even if the court believes that an alternative scheme would have been wiser. *R.A. Gray & Co.*, 467 U.S. at 729.

Congress' enactment of legislation that applies retroactively is viewed with the same "strong deference accorded [prospective] legislation in the field of national economic policy." *R.A. Gray & Co.*, 467 U.S. at 729. "[J]udgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* Congress thus may enact legislation that "attaches new legal consequences to events completed before its enactment," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), or "upsets otherwise settled expectations," *Usery*, 428 U.S. at 16, so long as "the retroactive application of the legislation is itself justified by a rational legislative purpose." *R.A. Gray & Co.*, 467 U.S. at 730; *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

Contrary to petitioner's substantive due process contention, it is clear that Congress acted with a rational legislative purpose. Congress recognized that the financial crisis in the retired miners' health care funds threatened the coal industry and the nation's economy. *See* Pub. L. 102-486, § 19142(a), 106 Stat. 2776, 3037 (1992). Congress' express aim in enacting the Coal Act was "to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry." *Id.* § 19142(b)(1). Both Congress and the Coal Commission found that coal miners had a reasonable expectation of health care benefits for life; that companies who had participated in the NBCWA process benefited from the miners' labor and labor peace; that companies whose former employees were beneficiaries were not contributing to the health benefit funds;

and that the dwindling funding base placed the employers' former employees at considerable risk. Congress' and the Executive Branch's decision that the retirees' former employers should bear some responsibility for health plan liabilities—and "pay-for-their-own"—stems from these determinations.

Petitioner's argument, moreover, rests on the proposition that Congress, the Executive Branch, and the Coal Commission simply were wrong in their factual analysis of the promise that had been made to miners and the health care fund crisis—and that this Court should invalidate important legislation on that basis. Pet. Br. at 21, 27-28. But, as demonstrated above, Congress and the Executive Branch carefully considered the situation and acted reasonably in analyzing the problem. Thus, "pay-for-your own" has a rational basis. Indeed, for these reasons, six Courts of Appeals have recognized the rationality of the Coal Act. Pet. App. A-2 (collecting cases). It would be a radical expansion of substantive due process if it immunized employers from paying for benefits owed their own employees when the benefits at issue arose from the employment relationship.[15]

The approach adopted by Congress, moreover, is at least as fair and reasonable as other alternatives.[16] As Sen-

[15] Petitioner extensively discusses the various NBCWA's that it signed, suggesting that those agreements define the limits of any responsibility that it may have to its former employees. The fact that petitioner may have fulfilled its contractual obligations is not an impermeable shield, however, against congressional action to address a problem that petitioner helped create. "Contracts, however express, cannot fetter the constitutional authority of Congress." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223-24 (1986) (citation omitted). Congress was aware that the collective bargaining system would not be sufficient to solve the problem, *i.e.*, forty years of NBCWA's were insufficient to protect the health care that had been promised to miners.

[16] Congress, of course, is under no obligation to adopt what a court deems the fairest approach. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976) ("whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension").

ator Wallop and other opponents of an industry-wide approach emphasized, many western and non-union coal operators never had anything to do with the multiemployer health benefit funds; it is far from self-evident that an industry-wide approach, while also defensible, is more fair or appropriate than "pay-for-your-own." Indeed, Senator Wallop and others argued it would be less fair.

Nor would it be fair (or practicable) to throw the burden onto the BCOA and those remaining in what the Coal Commission vividly called the "last man's club." The BCOA members and other signatories, who were shouldering the entire burden until the passage of the Coal Act, were wiling to pay for their *own* former employees, but had never employed most of the retirees who were eligible for health benefits from the funds. Petitioner suggests that the BCOA members (and other NBCWA signatories) should bear the cost of paying for Eastern's own former employees because, in petitioner's rendition, Eastern did not "cause" the problem and is not at fault. BCOA members, however, certainly did not "cause" the problem and certainly are not at fault. Indeed, BCOA members have shouldered the burden of paying health benefits for retirees whose employers walked away after enrolling their workers in the funds. The BCOA members, in contrast, did not expand the orphan class. Throughout the history of the funds, the BCOA members fully met their obligations. Petitioner implies that, because it purportedly broke no laws by stopping to contribute to the funds, it is unconstitutional to require petitioner to pay for those who worked for it. But, the BCOA members likewise could have abandoned the NBCWA system and stopped paying when the contract expired in 1993, and might well have been forced to do so by the ongoing financial crisis in the health care plans. This prospect is what Congress faced,

and it was reasonable for Congress to conclude that it would be unfair to single out the BCOA and other current signatories to bear the entire burden of continuing the program. Further, it would have been rational to determine that spreading the costs among a more limited group of companies, such as the BCOA and other current signatories, would not offer substantial financial relief in terms of either reducing the number of orphan beneficiaries or expanding the contribution base.[17]

Finally, it also would not have been fair to throw this burden on the miners and their families who, according to the Coal Commission, Congress, and the Executive Branch, had received promises of lifetime health care benefits.

Accordingly, Congress and the Executive Branch had a rational basis in adopting "pay-for-your-own" as the principle underlying the Coal Act; substantive due process affords no basis for invalidating the Coal Act.

2. The Takings Clause Does Not Compel Invalidating The Coal Act—The Takings Clause, which also has been invoked as a reason to strike down the Coal Act, cannot reasonably be considered an impediment to the solution reached by Congress. The Takings Clause does not grant employers a right to avoid liability for a burden relating to the employment relationship, leaving it for others to bear, simply because the employment relationship has ended. The Takings Clause does not prevent the government from adjusting the burdens and benefits of economic life by enacting cost spreading legislation. "Congress routinely creates burdens for some that directly benefit others"

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[17] Petitioner wholly ignores the fact, moreover, that, by participating in a multiemployer collective bargaining structure, employers become part of a collective program, with collective obligations. *See generally Brown v. Pro Football*, 116 S. Ct. 2116, 2122 (1996); *Concrete Pipe & Products*, 508 U.S. 602; *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

for valid legislative reasons. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986).

The Court has identified three factors that have "particular significance" in the Takings inquiry: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 224-225 (internal quotations omitted). Each of these factors, and all three considered together, demonstrate that Coal Act assessments do not constitute compensable takings under the Fifth Amendment.

First, as to the severity of the economic impact of the Coal Act, the liability assessed against a former employer under the Act rests "on the relationship between the employer," its employees, and the health benefit trust funds. *See Connolly*, 475 U.S. at 225. There are provisions in the Act that "moderate and mitigate the economic impact of an individual employer's liability" and ensure that the amount that a company is required to pay is in direct "proportion to its experience with the plan." *Connolly*, 475 U.S. at 225-26. For example, the Act places priority during the retiree assignment process on those employers who employed the miners for the longest, most recent period of time. 26 U.S.C. § 9706(a)(1). The Act also includes a provision that protects the right of companies to bring a civil action against another person or company "for responsibility for assigned premiums." 26 U.S.C. § 9706(f)(6). The fact that, after all these provisions are considered, an employer may still be required to pay some sum of money is a "necessary consequence" of the scheme, but does not amount to a taking. *Connolly*, 475 U.S. at 226.[18]

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[18] Petitioner "tries to shoehorn" its claim into the analysis applied in cases dealing with "permanent physical occupation or destruction of economically beneficial use of real property." *Concrete Pipe & Products*, 508 U.S. at 643. This Court's Takings deci-

Second, petitioner's own reasonable "investment-backed" expectations do not argue in favor of a contrary result. The history of the coal industry is marked by repeated government involvement with respect to health and safety. As the Coal Commission explicitly found, the federal imprint can be found throughout the Funds' existence, starting with the 1946 Krug-Lewis Agreement, and continuing through the government's intervention in coal strikes over health care. Thus, at no point was it "reasonable [for a coal operator] to expect to be held no more accountable than society at large for the health care of its retired coal miners." *In re Chateaugay*, 53 F.3d 478, 495-96 (2d Cir. 1995).

Third, as to the character of the governmental action, the Takings Clause does not bar Congress from adjusting the "benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225 (citing cases). Here Congress acted to protect the financial stability of the health benefit trust fund that was promised to coal miners by requiring former employers of those retirees "to fund its share" of the plan obligations incurred during its association with the plan. *Id.* With regard to the Takings Clause, this Court repeatedly has recognized Congress' broad authority concerning economic regulation. In *Usery*,

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sions, however, regularly have upheld complex economic regulations analogous to that at issue here, such as the Multiemployer Pension Plan Amendments Act of 1980 and the Coal Mine Health and Safety Act of 1969. *See Connolly*, 475 U.S. 211; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). As the Court has observed, "[i]t is well settled that a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987) (citations omitted). As with other economic statutes that the Court has upheld, the Coal Act permissibly safeguards the participants of the health care funds in order to "promote the common good." *Id.*

428 U.S. 1, for instance, this Court upheld the Black Lung Benefits Act of 1972, 30 U.S.C. § 901 *et seq.*, which required companies to compensate former employees whose employment relationship had terminated years before the statute was passed because those employers had benefited from their worker's labor during the period when the liability arose. Similarly, in *Connolly*, 475 U.S. 211, this Court upheld the pension plan withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, even though it required financial contributions from employers who, just as in this case, argued that they had completed their contractual commitments prior to enactment and walked away from their employees' pension funds.

In sum, the Coal Act meets the tests of rationality and fairness that are imposed by the Due Process and Takings Clauses of the Constitution. Congress and the Executive Branch recognized that the coal industry retirees' health benefit funds were on the brink of collapse. After careful consideration, they adopted a "pay-for-your-own" principle to safeguard the financial viability of the health plans. Neither substantive due process nor the Takings Clause compels this Court to strike down Congress' legislative judgment.

II. EASTERN IS PARTICULARLY ILL-SUITED TO RAISE ITS CLAIM OF UNFAIRNESS

Eastern is particularly ill-suited to claim unfairness resulting from application of the Coal Act. Eastern presents itself as a company that has had no relationship—with the coal industry or the NBCWA agreements—since 1966, and, therefore, as a company that has been particularly victimized by the Coal Act. Pet. Br. 34-35, 46-49. Even if Eastern's self-characterization were accurate, it would not undermine the constitutionality of the Coal Act, or the fairness and rationality of its "pay-for-your-own" principle. But Eastern's attempted self-characterization is manifestly contrary to fact.

First, until it sold its subsidiary to third-party respondent Peabody Coal Company in 1987, Eastern continued to reap enormous profits from its corporate participation in the coal mining industry. In 1966, Eastern established a wholly-owned subsidiary, Eastern Associated Coal Company ("Eastern Associated"), and transferred its coal division to the new subsidiary. Eastern's wholly-owned subsidiary, Eastern Associated, earned millions of dollars from coal mining—and funneled those millions to its parent, petitioner Eastern—through the 1960's, 1970's and 1980's (until the sale in 1987). RA 2170-72, 2185.

Second, Eastern exercised direction and control over its subsidiary Eastern Associated throughout this period, *including Eastern Associated's participation in the BCOA and NBCWA agreements.* Top officers of Eastern Associated were *simultaneously* top officers of Eastern itself. Eastern Associated's President from 1970 to 1981, for example, simultaneously served as Senior Vice-President, and, later, Executive Vice President of Eastern.[19] This joint Eastern-Eastern Associated official served as President of Eastern Associated at the time of Eastern Associated's ratification of the 1971, 1974, and 1978 NBCWA's. Similarly, Eastern Associated's President in 1984 likewise simultaneously served as Senior-Vice President at petitioner Eastern itself, during the period when Eastern Associated ratified the 1984 NBCWA.[20]

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[19] In 1970, Eastern named Robert H. Freeman President of Eastern Associated, and appointed him to serve concurrently as Senior Vice President of Eastern itself, as well as a member of the Board of Trustees of Eastern. *Business Wire*, July 25, 1985, *available in* LEXIS, News Library, BWIRE File. In 1977, Eastern named Mr. Freeman, who continued to serve as President of Eastern Associated, to act simultaneously as Executive Vice President and Chief Operating Officer of Eastern. See *Wall Street Journal*, July 24, 1977, at 21. He retained his dual role—simultaneously acting as a top officer of petitioner and petitioner's subsidiary—until 1981. *Coal*, April 1981, at 200.

[20] Starting in 1984, John H. Hancock served both as President of Eastern Associated and as Senior Vice President in charge of coal operations at Eastern. *The Financial Times*, June 19, 1984, at 33.

Indeed, Eastern and Eastern Associated—the parent and the wholly-owned subsidiary—revealed a remarkable display of integration in their coal operations. Eastern, for example, frequently trumpeted its subsidiary's business operations—announcing, for example, that its subsidiary had purchased a coal mine interest.[21]

Accordingly, at a time when Eastern Associated was subject to the control and direction of Eastern, Eastern's wholly-owned subsidiary was a member of the BCOA and a signatory to the 1971, 1974, 1978, 1981, and 1984 NBCWA's. Any suggestion that Eastern was a stranger to developments in the coal industry, including the NBCWA's, in the 1970's and 1980's—and that it was not intimately involved in those developments—is preposterous. Reaping the benefits of its coal subsidiary's mining, and directing its coal subsidiary's affairs at a time when its subsidiary was a signatory to NBCWA's and participating in the BCOA, Eastern is particularly unsuited to claim unfairness on the ground that it had left the field in 1966 and washed its hands of coal industry developments.[22]

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[21] *Business Wire*, July 10, 1984 (Eastern announces acquisition by Eastern Associated of NuEast Mining Corp.), *available in* LEXIS, News Library, BWIRE File; *see also id.* January 31, 1984 (Eastern announces Eastern Associated's entry into mineral lease and coal purchase agreements); *id.* July 22, 1985 (Eastern announces appointment of Walter Mueller, Jr., as Executive Vice President at Eastern Associated); *Coal*, April 1981, at 200 (Eastern "named Ronald E. Sieling as president of its largest subsidiary, [Eastern Associated].").

[22] Eastern also remains a highly profitable company, with earnings from continuing operations of $53.8 million in 1995 and $60.7 million in 1996, even after providing for potential Coal Act liabilities. Eastern Enterprises, 1996 Annual Report 1 (1996). Eastern's company-specific challenge thus clearly does not present a situation, like that claimed in conclusory statements in some *amicus* briefs, in which it is asserted that the Coal Act threatens insolvency. With-

As on its general claims on substantive due process and the Takings Clause, petitioner falls far short in attempting to establish that it is a particular victim of unfairness. Its own wholly-owned subsidiary participated in the very events to which it claims to be a stranger; and its wholly-owned subsidiary generated millions of dollars for petitioner from precisely that activity. Petitioner thus is particularly ill-suited to be raising its claims of unfairness.

CONCLUSION

The Coal Act was enacted to stabilize the financing of a health care system that had been promised to coal miners. In responding to the looming financial disaster, Congress crafted a rational and fair solution, based on the "pay-for-your-own" principle. Nothing in substantive due process or the Takings Clause compels the judicial invalidation of this legislation.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CLIFFORD M. SLOAN
Counsel of Record
PAUL L. JOFFE
MEREDITH FUCHS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for Amicus Curiae

January 20, 1998

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out conceding the accuracy of those assertions, *amicus* BCOA is confident of the Coal Act's constitutionality; it is indisputable, however, that petitioner Eastern does not remotely present such an insolvency claim, and such a situation is not before the Court in this case.

BEST AVAILABLE COPY

[redacted]
City Attorney
Public Safety Unit
Chief Assistant City Attorney
Attorney-in-Charge
Assistant City Attorney
City of Los Angeles
1700 City Hall East
200 North Main Street
Los Angeles, CA 90012-4130
(213) 485-4516

WILLIAM B. CONNERS
City Attorney
City of Monterey
City Hall
Monterey, CA 93940
(408) 646-3935

JAYNE W. WILLIAMS
City Attorney
City of Oakland
1 City Hall Plaza
Oakland, CA 94612
(510) 238-3081

SAMUEL L. JACKSON
City Attorney
City of Sacramento
980 Ninth Street, 16th Floor
Sacramento, CA 95814
(916) 264-5346

CASEY GWINN
City Attorney
City of San Diego
1200 3rd Avenue, Suite 1100
San Diego, CA 92101
(619) 533-5800

[redacted]
City Attorney
[redacted]
[redacted]
[redacted]

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Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) 9

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Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*

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Ferguson v. Skrupa, 372 U.S. 726 (1963) 20

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 12

Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed.Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) 13

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Goldblatt v. Hempstead, 369 U.S. 590 (1962) 15

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Harmelin v. Michigan, 501 U.S. 957 (1991) 11

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Loveladies Harbor v. United States, 15 Cl.Ct. 381 (1988), *aff'd*, 28 F.3d. 1171 (Fed Cir. 1994) 14

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Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896) 16

Nectow v. City of Cambridge, 277 U.S. 183 (1928) .. 14, 15

Table of Authorities (continued)

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New Port Largo, Inc v. Monroe County, 95 F.3d 1084 (11th Cir. 1996) 9

New State Ice, Co. v. Liebmann, 285 U.S. 262 (1932) ... 22

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Northern Illinois Home Builders Assn. v. County of DuPage, 649 N.E.2d 384 (Ill. 1995) 10

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Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) 20

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Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 24, 25

Yee v. City of Escondido, 503 U.S. 519 (1992) 25

Miscellaneous

Bork, Robert, *The Tempting of America: The Political Seduction of the Law* (1990) 19

Curtis, Larry, Testimony before the Senate Judiciary Committee, Oct. 7, 1997 2

Diamond, Henry & Patrick Noonan, *Land Use in America*, (1996) 23

Table of Authorities (continued)

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Hart, John F., "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 *Harvard Law Review* 1252 (1996) 18, 19, 20

Laitos, Jan G., "Takings and Causation," 5 *William & Mary Bill of Rights Journal* 359 (1997) 14

Rehnquist, William, Chief Justice of the U.S. Supreme Court, "1997 Year-End Report of the Federal Judiciary," January 1, 1998 24

Sax, Joseph L., "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 *Stanford Law Review* 1433 (1993) 21

Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 *Columbia Law Review* 782 (1995) 19

STATEMENT OF INTEREST[1]

The *amici curiae* — the Cities of Long Beach, Los Angeles, Monterey, Oakland, Sacramento, San Diego, San Jose, San Rafael, Sunnyvale; County of Santa Barbara; and City and County of San Francisco — are local governments established under the laws of the State of California. In California, as in most states, local governments have primary responsibility to plan and regulate land uses. The *amici* communities have a substantial interest in this case because petitioner and its *amici* urge the Court to adopt a broad, unprecedented reading of the taking clause. This interpretation, if adopted, would result in the filing of significantly greater numbers of claims under the taking clause for financial compensation based on local land use regulation. Increased constitutional litigation over local land use regulation would tend to undermine the fiscal health of *amici* communities; restrict *amici*'s ability to establish and maintain safe, healthy, attractive and economically efficient patterns of development; and reduce the ability of democratically elected local officials to govern these communities.

While this case arises from a relatively unique federal program relating to one industry, the sweeping proposal advanced by petitioner and its *amici* to change established takings doctrine could have ramifications far beyond the context of this case. The taking clause probably is the most frequently cited constitutional provision relied upon in constitutional challenges to local land use regulations. The Court's reading of the taking clause in this narrow case

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[1] Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. *See* Supreme Court Rule 37.

therefore could profoundly affect *amici* communities and other American cities and towns.[2] *Amici* have a strong stake in ensuring that this relatively narrow case does not result in a decision that has unintended and unwarranted adverse consequences for *amici* and other communities. In line with *amici*'s interest in this case, this brief focuses solely on the taking issue in this case.

SUMMARY OF ARGUMENT

The Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), cannot, consistent with the actual holdings and reasoning in those decisions, govern the resolution of the taking claim in this case. The unique, exacting standard of review adopted in *Nollan* and *Dolan* is explained and justified by two factors not present in this case — an adjudicative decision imposing a condition on land development, and a direct appropriation of private property for public use. The Court should resolve this case using the traditional three-part test the Court employed to evaluate a similar taking claim only a few years ago in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

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[2]The *amici* California cities and counties have relatively large populations and budgets, as well as full-time legal counsel, but it is useful to observe, according to figures compiled by the National League of Cities, that over 90% of America's 36,000 cities and towns have populations of less than 10,000, and, of these, almost all lack full-time legal counsel or the financial resources to withstand concerted constitutional litigation over local land use issues. *See* Testimony of Larry Curtis, Mayor of Ames, Iowa, on behalf of the National League of Cities, before the Senate Judiciary Committee, October 7, 1997 (citing example of Missouri community of several hundred residents sued for $8,000,000 for alleged regulatory taking).

The Court should reject petitioner's proposal to include means-ends analysis as a general component of the inquiry into whether a regulation effects a taking requiring the payment of compensation under the taking clause. Judicial inquiry into the reasonableness of the means selected to advance governmental ends, and the legitimacy of those ends, is a traditional part of the Court's analysis of government action under the due process clause. By contrast, taking analysis does not generally focus on the validity of government action, but instead focuses on whether the public must pay "just compensation" as a condition of proceeding with the action. Contrary to the implicit assumption of petitioner and its *amici*, there is nothing in the language or history of the taking clause to suggest it means the same thing as the due process clause.

Finally, the Court should reject petitioner's proposal to expand the taking clause because it conflicts with other important constitutional values and interests. In particular, petitioner's proposal would violate the principle that a constitutional provision must be read in accordance with the text and original understanding of the provision; conflict with the limited role of the judiciary under our system of separation of powers; undermine our federal structure of government; and result in new burdens on the federal courts which would dilute the federal courts' traditional character as a distinctive forum of limited jurisdiction.

ARGUMENT

I. *Nollan* and *Dolan* Establish a Special Test Uniquely Applicable to Adjudicative Decisions Which Affect the "Essential Right" of an Individual Property Owner to Exclude the General Public from Private Land.

The petitioner and petitioner's *amici* contend that the Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should govern resolution of petitioner's taking claim. This contention is based on a fundamental misreading of those decisions. The Court in *Dolan* went out of its way to emphasize that ordinary land use regulations, which generally are not affected by the taking clause, "differ in two relevant particulars from the present case." 512 U.S. at 385. First, the Court stated that most land use regulations establish general rules for different areas of the community, "whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Ibid.* Second, the Court emphasized that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." *Ibid.* The same distinguishing features were present in the *Nollan* case.

Nollan and *Dolan* establish the following narrow rule: To defeat a taking claim based on an adjudicative order requiring an owner, as a condition of obtaining a development permit, to dedicate private property to the public, there must exist an "essential nexus" between a legitimate state interest and the required exaction, as well as a "rough proportionality" between the degree of the exaction and the projected impact of the development. In addition, the Court placed the burden on the local government to justify the exaction under this two-part

test. 512 U.S. at 391. *See also id.* at 405 (Stevens, J., dissenting); *id.* at 413-414 (Souter, J., dissenting).

The two critical elements the Court identified — an adjudicative decision imposing a condition on development, and a direct appropriation of private property for public use — explain the outcome in *Dolan* and *Nollan*, justify the special test the Court adopted, and define the universe of cases to which this standard can appropriately be applied in the future. Because neither of these two critical elements is present in this case, there is no basis for applying the *Nollan/Dolan* test in this case. The scope and rationale for the distinguishing elements in *Nollan* and *Dolan* are discussed in greater detail below.

A. Legislative/Not Adjudicative.

First, the *Nollan/Dolan* test only applies to "adjudicative decisions" affecting one "individual parcel" of land, not to "legislative determinations" establishing broad rules for a general category of property owners. 512 U.S. at 385. *Nollan* and *Dolan* arose from similar facts, and each involved a challenge to a development exaction imposed on one particular development through adjudicative decision-making. *Dolan* involved a challenge to a permit order by the City of Tigard planning commission. *Nollan* involved a permit order issued by the California Coastal Commission. In discussing the appropriate standard to apply in these cases, the Court distinguished a taking claim based on case-by-case, adjudicative decision-making from a claim challenging an "essentially legislative determination," which the Court believed was entitled to more latitude than case-by-case adjudication. The Court apparently based this distinction on its perception that the imposition of conditions on development through adjudicative decision-making created a unique risk of unfair burdens on the landowner. *Dolan*, 512 U.S. at 385-386; *see* also *Nollan*, 483 U.S. at 837 ("unless the permit condition

serves the same governmental purpose as the development bar, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion"). Thus, *Nollan* and *Dolan* establish a special, exacting rule for a narrow category of cases.

In accord with this understanding of the critical importance of the adjudicative/legislative distinction to the Court's analysis in *Dolan* and *Nollan*, the majority of lower federal and state appellate court decisions have read *Dolan* and *Nollan* as being limited to the adjudicative context. *See Home Builders Assn. v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997) (rejecting taking claim based on development exaction addressing water shortages, because it "involve[d] a generally applicable legislative decision by the city"); *Parking Assn. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (*Nollan/Dolan* standard not applicable to taking claim based on conditions imposed, pursuant to municipal ordinance, on construction of urban parking garages); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal.), *cert. denied*, 117 S.Ct. 299 (1996) (following *Dolan*, and concluding that a condition attached to a permit order effected a taking, but rejecting a taking challenge to a condition imposed by municipal ordinance); *Waters Landing Limited Partnership v. Montgomery County,* 650 A.2d 712 (Md. 1994) (*Dolan* not applicable to county ordinance imposing development tax assessments). *But see Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (applying *Dolan* heightened scrutiny, over strong dissent, to city rent control legislation); *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994) (concluding that subdivision ordinance meets *Dolan* "rough proportionality" standard, without discussing whether *Dolan* standard actually applies to legislation).

The financial responsibilities Eastern Enterprises challenges in this case were not set through any type of adjudicative process. The Coal Act defines these responsibilities. Because the *Nollan* "essential nexus" and *Dolan* "rough proportionality" standards do not apply to legislative rules, the *Nollan/Dolan* standard does not apply in this case.

B. No Limitation on Right to Exclude.

Furthermore, both *Nollan* and *Dolan* involved challenges to permit "exactions" which required landowners to convey a recognized interest in real property and eliminated the owners' right to exclude members of the general public from private property. This second element was another underpinning of the Court's conclusion that these requirements were subject to a special type of review.

The *Nollan/Dolan* decisions rest in part on the critical fact that the exactions in those cases, if imposed directly rather than as a condition of a permit, would unquestionably have effected a taking. *See Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across the beachfront available to the public on a permanent basis in order to increase public access to the beach. . . we have no doubt there would have been a taking."); *see Dolan* 512 U.S. at 284 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use. . . a taking would have occurred.") These conclusions followed from the Court's prior decisions recognizing that the right to physically exclude the public from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan*, 483 U.S. at 831; *see also Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 433 (1982) (government-mandated permanent physical occupation of private property constitutes a *per se* taking);

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."); *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J.) ("[a]n essential element of individual property is the legal right to exclude others from enjoying it"). This central premise of the *Nollan* and *Dolan* decisions is, of course, dramatically different from the Court's recognition, outside of the context of physical occupations, that "in the course of regulating commercial and other human affairs, [legislatures] routinely create[] burdens for some that directly benefit others" without violating the taking clause. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1987).

The issue the Court faced in *Nollan* and *Dolan* was how to approach review of the exactions, given that these uncompensated infringements on the right to exclude the public from private property — rather than being imposed directly — had instead been imposed through conditions attached to development permits. On the one hand, the Court had to weigh the *per se* rule prohibiting permanent, uncompensated elimination by government of the right to exclude; on the other hand, the Court had to weigh the traditional rule that government decisions regulating the use (as opposed to occupation) of private property generally are not takings. *See Dolan* 512 U.S. at 385 & n. 6; *id.* at 391 n.8 The Court resolved the issue by formulating a new, unique test to deal with the special issues presented by the intersection of the *per se* rule against uncompensated permanent occupations and the broad latitude afforded regulatory permitting authority. *Cf. Nollan*, 483 U.S. at 841 ("We are inclined to be particularly careful. . . where the actual conveyancing of property is made a condition of lifting a land-use restriction.")

Consistent with this reading of *Nollan* and *Dolan*, the majority of lower federal and state appellate court decisions have read *Nollan* and *Dolan* as being limited to the physical exactions context. *See Home Builders Assn. v. City of Scottsdale, supra* (municipal requirement that owner cede land to the public is "a particularly invasive form of land regulation," in contrast to imposition of a fee, which is a "more benign form of regulation"); *New Port Largo, Inc v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996) (*Dolan* and *Nollan* irrelevant to taking challenge to zoning ordinance where the ordinance "told [the owner] how it could use the property..., but did nothing to require [the owner] to open its property to the public for use just as the public wished"); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure"); *McCarthy v. City of Lakewood*, 894 P.2d 836 (Kan. 1995) (*Dolan* applies to actual dedications of land only); *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (no decisions "have interpreted [*Nollan*] as

changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land").[3]

This case does not involve government action which impinges on the right to physically exclude the general public from private property. *See U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (rejecting argument that a financial assessment is a type of "physical occupation" of private property, because "money is fungible"). Indeed, this case does not involve land at all, but rather ordinary business assets, and therefore is arguably outside the scope of "regulatory takings." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992) ("in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property worthless"). Accordingly, the analysis in *Nollan* and *Dolan* cannot be applied in this case consistent with the holdings and reasoning in those cases.

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[3] Of the handful of cases in which the *Nollan/Dolan* standard has been applied outside of the physical exactions context, most have involved monetary exactions in lieu of physical exactions. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2nd 429 (Cal.), *cert. denied*, 117 S.Ct. 299 (1996); *Northern Illinois Home Builders Assn. v. County of DuPage*, 649 N.E.2d 384, 388-89 (Ill. 1995). However, even these aberrant decisions, which are inconsistent with the Court's reasoning in *Nollan* and *Dolan*, do not support applying the *Nollan/Dolan* standard in the present case. In *Ehrlich*, for example, the California Supreme Court concluded that the *Nollan/Dolan* test should be extended to fee exactions, but only if the exactions were imposed "on an individual and discretionary basis," 911 P.2d at 444; the assessments under the Coal Act challenged in this case were not, of course, arrived at through adjudicative decision-making.

II. Means-Ends Scrutiny Is Not a General Component of the Inquiry Into Whether a Government Action Effects a Taking Requiring the Payment of Compensation Under the Taking Clause.

Apart from the fact that *Nollan* and *Dolan* do not apply in this decisively different context, there also is no basis for petitioner's more general argument that some type of means-ends scrutiny, whether deferential or otherwise, represents a general component of the inquiry into whether a government action effects a taking requiring the payment of just compensation. The Court has never relied on means-ends scrutiny to support the conclusion that ordinary government regulation effects a taking requiring the payment of just compensation. While means-ends analysis represents a traditional component of due process analysis, it simply has no logical place in the ordinary just compensation inquiry. Contrary to the assumption of petitioner and its *amici*, it is far more logical to read the different language in the taking and due process clauses to mean different things, not the same thing. *See Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.) ("When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.") Rather than embarking under the taking clause on a broad-ranging assessment of the reasonableness of the means Congress selected in adopting the Coal Act, the Court should resolve the taking claim in this case, if it reaches the issue at all, using the traditional three-factor analysis the Court applied only a few

years ago in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).[4]

Judicial inquiry into the reasonableness of the means selected to advance governmental ends, as well as the legitimacy of those ends, relates to whether a government action is valid and can proceed. But the validity of a governmental action — as opposed to whether the public must pay "just compensation" as a condition of proceeding with the action — does not fit comfortably with traditional just compensation analysis under the taking clause. At the distinctive core of takings analysis is the presumption that the means and ends government has selected are valid; the relevant question is whether the taking clause compels the payment of just compensation as a condition of government carrying out presumptively valid action. As the Chief Justice stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987), the taking clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." The goal of the taking clause, rather than to prohibit particular governmental actions, is simply "to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960). *See also Bay View, Inc. v. Ahtna*, 105 F.3d

[4] Without repeating in any detail the arguments likely to be presented by respondents, the *amici* support the conclusion that there was no taking in this case under the traditional three-part test, given that: the government action does not effect a direct appropriation of private property but rather "arises from a federal program that adjusts the benefits and burdens of economic life to promote the public good," 103 F.3rd at 161; the absence of any showing of a substantial adverse economic impact on petitioner's property as a whole, much less a total denial of all economic use; and the petitioner's long-time, profitable involvement in the coal industry, which has been heavily regulated for the last 50 years.

1281, 1284-1285 (9th Cir. 1997) ("the government is not prohibited from taking private property; indeed the eminent domain clause contemplates that government will take private property as needed for public purposes, so long as it pays compensation"); *Tabb Lakes, Ltd v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (viability of taking claim "depend[s] upon the validity of the governmental action"); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 898-99 (Fed.Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (in taking suits, the validity of government action must be established, or at least presumed for the sake of argument, before proceeding to question of whether compensation is due).[5]

While a number of the Court's taking decisions contain language suggesting that some type of means-ends inquiry might be relevant to the just compensation inquiry, the Court has never squarely addressed the issue. More importantly, outside of the narrow, unique context of development exactions, the Court has *never* found a taking requiring the payment of just compensation on the ground that government

[5] This understanding of the taking clause is not contradicted by the fact that the Court has recognized an implicit exception to the general rule that a taking claim must be brought as a suit for just compensation in the case of a suit to enjoin alleged takings which involve direct transfers of money to the government. *See, e.g., Connolly v. Pension Benefit Guaranty Corp., supra.* In that circumstance, interpreting the taking clause as mandating that relief be sought in a suit for just compensation, rather than equitable relief, arguably "would entail an utterly pointless set of activities, as '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of... compensation.'" *Student Loan Marketing Association v. Riley*, 104 F.3rd 397, 401 (D.C. Cir.), *cert. denied*, 118 S.Ct. 295 (1997) *quoting In re Chateaugay*, 53 F.3rd 478, 493 (2nd Cir. N.Y.), *cert. denied*, 116 S.Ct. 298 (1995). Whatever the scope of this apparent exception, it is entirely consistent with the basic principle that the taking clause is not intended to prohibit government action *per se*, but rather to require payment of compensation in the event government action effects a taking.

action failed some type of means-ends test. *See Loveladies Harbor v. United States*, 15 Cl.Ct. 381, 390 (1988), *aff'd*, 28 F.3d. 1171 (Fed Cir. 1994) (Smith, C.J.) (stating that "*no* court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced") (Emphasis added). *Compare* Laitos, Jan G., "Takings and Causation," 5 *William & Mary Bill of Rights Journal* 359, 371 (1997) (Supreme Court has never adopted view that taking clause requires that regulated property owners must have "caused" social problem being addressed by regulation).

The opinion of the Court most frequently cited to support some type of means-ends inquiry under the taking clause is *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), a brief, unanimous decision *upholding* a zoning ordinance against a takings challenge. The opinion does indeed state that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." *Id.* at 260. But the only support cited for this proposition was *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a constitutional challenge to a zoning regulation, but one based on the *due process* clause, not the taking clause. Moreover, even as a statement of a due process means-ends analysis, the language in *Nectow* reflects the kind of exacting scrutiny of regulatory action superseded by more recent Supreme Court decisions interpreting the due process clause. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). There is no indication in the brief *Agins* decision that the Court recognized that *Nectow* did not support the proposition for which it was cited, much less any discussion of the pros and cons of potentially taking the radical step of incorporating means-ends analysis into takings doctrine. Nothing in the circumstances or text of *Agins* suggests that the Court intended to take such a step.

Reliance on the Court's decision in *Penn Central*, 438 U.S. at 127, to support an ostensible means-ends component of takings doctrine is similarly misplaced. The *Penn Central* Court did state that "[i]t is implicit in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose," again citing *Nectow*. However, *Penn Central*, a decision *rejecting* a taking claim, contains no indication of any intent to establish an entirely new branch of analysis under the taking clause. *Goldblatt* does not in fact "implicitly" support any such conclusion; the case involved a due process challenge to a land use regulation, as well as a separate taking claim, and the Court discussed legislative means and ends *exclusively* in relation to the due process claim. And, as discussed above, *Nectow* was not a taking case at all, but instead reflected an outmoded method of due process analysis.[6]

---

[6] Because taking claims do not formally implicate the validity of government activity, *see* p. 12, supra, the Court's takings precedents (quite logically) do not suggest that the courts owe the legislative branch any particular deference in considering claims for just compensation under the taking clause -- in marked contrast to the very explicit deference the Court grants the legislative branch under the due process clause, *See, e.g., Concrete Pipe & Products, supra,* 508 U.S. at 637 ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court [under the due process clause] with a presumption of constitutionality.") The lack of formal judicial deference to legislative judgments in taking suits supports the conclusion that the taking clause must have a different, more limited scope than the due process clause. *Compare Connolly v. Pension Benefit Guaranty Corp., supra,* 475 U.S. at 223 (after concluding that a federal program does not violate the due process clause, "it would be surprising indeed to discover" that the program effected a taking requiring payment of compensation).

Finally, the Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), supports the conclusion that means-ends analysis is not an appropriate general component of the inquiry into whether a government action effects a taking requiring the payment of just compensation. The Court in *Midkiff* recognized the relevance of means-ends analysis in determining whether a government action must be invalidated because it fails to meet the "public use" requirement of the taking clause. *See* 467 U.S. at 241. However, the Court emphasized the distinction between the "just compensation" and "public use" requirements. The taking clause requires payment of "just compensation" when a government action serving a valid public purpose results in a taking. On the other hand, when a government action does not serve a valid public purpose, whether compensation is provided or not, the action is invalid and must be proscribed. *Ibid.* *Midkiff* does not suggest that an invalid government action which violates the "public use" requirement necessarily creates a claim for just compensation; indeed, the fact that the court indicated that a taking not for "public use", whether or not compensated, must be proscribed, suggests just the opposite. Thus, the decision supports the conclusion that means-ends analysis is not a general component of the just compensation inquiry. [7]

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[7] It is debatable whether the standard for invalidating government action under the "public use" requirement is distinguishable from the requirements of due process. *See, e.g.*. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403 (1896) (invalidating under the due process clause a compensated "taking" of private property, when the "ordinance in question was not, and was not claimed to be... a taking of private property for public use under the right of eminent domain"); *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937) (invalidating, apparently on due process grounds, an uncompensated taking which did not serve a legitimate public purpose). *See generally Midkiff*, 467 U.S. at 241 (discussing *Missouri Pacific, Consolidated Gas*, and other cases). It is clear that the Court's test for invalidation of government actions which fail the "public use" requirement is not intended to be any more exacting than the minimal rationality standard under the due process clause. *See Id.* at 239-40.

III. The Proposal to Expand the Takings Inquiry By Adding a General Means-Ends Test Threatens Other Important Constitutional Interests.

The Court also should reject petitioner's proposal to expand the scope of the taking clause because adoption of this proposal would sacrifice other values and interests which are central to our system of constitutional government. Four major constitutional concerns raised by this expansive reading of the taking clause are discussed below.

A. The Original Understanding of the Taking Clause.

The petitioner's proposed reading of the taking clause contradicts the principles that a constitutional provision must be read in accord with the "express language" of the provision, *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), as well as relevant "historical practice," *United States v. Gaudin*, 515 U.S. 506, 516 (1995). *See also Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.")

These principles of constitutional interpretation point to a reading of the taking clause focusing on actual physical appropriations of property and regulatory actions which are the functional equivalent of physical appropriations. The Court's leading decisions interpreting the taking clause respect the limitations rooted in the language and history of the clause. By contrast, petitioner's proposal to incorporate means-ends analysis into the just compensation issue has no plausible basis

in the language of the taking clause or the available evidence of the drafters' original understanding.

Read in accordance with natural and customary usage, the term "take" refers to a range of governmental actions which involve the actual appropriation of an owner's private property by the government. An individual "takes" his son's ball if he grabs the ball and places it on a closet shelf; there is no "taking" if he simply directs the child to stop bouncing the ball off the living room wall or tells him to play with the ball in the backyard. Likewise, a local government "takes" a person's land when it effects a transfer of title to the government and builds a public facility on the land. The local government does not "take" land in the ordinary sense by enforcing the local zoning code limiting the number of houses the owner can place on the land, or by restricting development in high hazard areas such as on steep slopes or flood plains. And the Court's decisions are basically consistent with this reading of the plain text, unless (in general) the government leaves the owner with no economic use of the land. *Lucas v. South Carolina Coastal Council, supra.*

Historical research on the original understanding of the taking clause supports the conclusion that the basic issue addressed by the taking clause is the physical appropriation of private property. *See Lucas*, 505 U.S. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"). Professor John Hart, based on a comprehensive survey of land use regulatory practices in the colonial era, has concluded that the framers' consciously and purposefully drafted the taking clause to focus on direct appropriations of private property: "The Framers knew that land use regulation had served broad purposes in their time, and they evidently considered subjecting this sphere of government action to substantive constitutional review to be

inappropriate." Hart, John F., "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 *Harvard Law Review* 1252, 1292 (1996). *See also* Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 *Columbia Law Review* 782 (1995) (available evidence "clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations"); *cf.* Robert Bork, *The Tempting of America: The Political Seduction of the Law* 230 (1990) ("My difficulty is not that [Richard] Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.")

The Court's decisions interpreting the taking clause have respected the original understanding of the clause, by effectively limiting so-called "regulatory takings" to instances in which regulatory actions are the functional equivalent of physical appropriations. In *Lucas*, in particular, the Supreme Court recognized that a regulation which deprives the owner of "all economically beneficial or productive use of land" is generally a taking because, among other things, a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017. *See also San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J.) (observing that certain land use regulations "can destroy the use and enjoyment of property. . . just as effectively as formal condemnation or physical invasion of property"). If the regulatory takings doctrine is to have any coherent limits which respect the text and original understanding of the taking clause, only regulations which are functionally equivalent to physical appropriations can properly be understood to be takings. *See*

Hart, *supra*, 109 Harv.L.Rev. at 1293 ("The Takings Clause ought not to apply to *any* forms of land use regulation that do not approximate eminent domain by effectively depriving a landowner of possession.")

On the other hand, adding means-ends analysis to the just compensation inquiry would take the Court far afield from the actual text and original understanding of the taking clause. Means-ends inquiry would create potential financial liability for all sorts of regulations which have slight or even trivial economic impacts and which cannot be equated in any sense to the actual appropriation of private property.

B. Limited Judicial Role.

The proposed expansion of the taking clause would invite searching judicial second-guessing of legislative judgments, contradicting the bedrock principle that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963). *See also Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.").

Defining and redefining property interests over time is one of the single most important functions of democratically elected legislatures. In response to changing economic needs, cultural understandings and political arrangements, property law in this country has constantly undergone change. Among other changes in property law, Professor Joseph Sax noted recently:

> In eighteenth century America, the states abolished feudal tenures, abrogated primogeniture and entails, ended imprisonment for debt, and significantly

> reduced rights of alienation, as well as dower and curtesy. . . . In the arid west, landowners' riparian rights were simply abolished because they were unsuited to the physical conditions of the area. As the status of women changed, laws abolished husbands' property rights in their wives' estates.

Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 *Stanford Law Review* 1433, 1448 (1993).

The petitioner's proposed means-ends test under the taking clause would authorize the courts to adopt fixed property norms as constitutional doctrine. This constitutionalization of property law would retard or block the fulfillment of new social and economic goals, as well as the adoption of innovative methods for addressing emerging social problems. While at first merely inconvenient to local communities, the freezing of property norms would, over time, significantly frustrate the ability of local communities to resolve important problems. The Court should decline the invitation offered in this case to venture into that dangerous territory.

C. Federalism.

The proposal to expand upon traditional understandings of the taking clause also conflicts the fundamental principle that the Constitution created a Federal Government of limited powers, leaving all remaining powers in the States. See U.S. Const., Amendment X. As the Court explained in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the principle of dual Federal-State sovereignty infuses every aspect of the Constitution:

> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent

> existence, . . . [W]ithout the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Id. at 457, *quoting Texas v. White*, 74 U.S. 700, 725 (1869).

Federalism affords American society numerous practical advantages. Among other things, "[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. at 458. *See also New State Ice, Co v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

The advantages of Federalism are especially great in the context of managing land uses. Our nation is a land of enormous extremes: of climate, topography, ownership patterns, population density, rate of growth (or depopulation), and social values, to name but a few factors. Land use planning and regulation in America reflects this diversity. Some

intensely developed and rapidly growing communities face serious environmental, social, and economic challenges related to the use of land, and have adopted sophisticated land use regulatory programs to address these problems. *See* Henry Diamond & Patrick Noonan, *Land Use in America* 13-42 (1996). Other, more rural communities have adopted relatively simple approaches more appropriate to their circumstances. A few States have developed state-level programs to address at least certain major land uses, while most other states have assigned basic responsibility for land use decisions to counties, cities, and/or towns. *Id.* at 26.

The taking clause has traditionally been read to respect the sovereign authority of the states and their subdivisions to manage local land uses. More specifically, the Court has recognized, in the context of the taking clause, that "[p]roperty interests. . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). This recognition protects our federal system of government, by defining an aspect of property law assigned primarily if not exclusively to the States, and by limiting the preemptive reach of the Court's interpretations of the taking clause. *Compare Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) ("Land use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live and work in the community.")

Petitioner's proposal to expand the scope of takings doctrine by including a means-ends component would tend to undermine our federal system by imposing a significant new constraint on state sovereign authority to define — and, as appropriate, over time, redefine — property norms to match

modern circumstances. Just as the Court will not lightly infer that Congress intends to invade state sovereignty, *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute"), the Court should be wary of proposed judicial innovations which would undermine federalism unless such innovations are mandated by some other provision of the Constitution. It cannot plausibly be argued that the language and history of the taking clause mandate expansion of takings doctrine at the expense of federalism.

D. Distinctive, Limited Jurisdiction of the Federal Courts.

Adoption of petitioner's reading of the taking clause would increase the volume of constitutional challenges to zoning and other local land use measures in federal court, creating a larger federal case load and undermining the distinctive role of the federal courts in our constitutional system. As the Chief Justice observed in his recently issued "1997 Year-End Report of the Federal Judiciary," one of the most significant problems facing the federal judiciary is the "large and expanding workload." The Chief Justice observed: "Unless steps are taken to stop or reverse this trend, either the demands placed on the federal Judiciary will eventually outstrip its resources, or the Judiciary will become so large that it will lose its traditional character as a distinctive judicial forum of limited jurisdiction." Expanding the just compensation inquiry by incorporating means-ends scrutiny would expand the volume of taking claims, in both federal and state courts. However, it would impose a particularly significant new burden on the federal courts.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Court established that

a taking claim against a unit of local government is not "ripe" for federal court review unless and until (1) the local government "has arrived at a final, definitive position regarding how it will apply the regulations at issue," *id.* at 191 and (2) the claimant has sought "compensation through the procedures the States have provided for doing so," *id.* at 194. *See also Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659, 1664 (1997). These ripeness rules ensure that a large volume of litigation arising from local land use regulation is addressed, at least in the first instance, in the state court systems rather than in federal courts. By contrast, incorporating a means-ends analysis into takings doctrine would invite claimants to circumvent these ripeness limitations, and encourage direct filing of essentially local property disputes in federal court, because a taking claim based on the theory that a government action is not logically related to a legitimate government interest apparently would be exempt from *Williamson County*. *See Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992) (claim that regulation effected a taking because it failed to substantially advance a legitimate government interest held ripe, but declining to rule on the merits of claim because issue was not fairly presented in the petition for *certiorari*); *Richardson v. City of Honolulu*, 124 F.3rd 1150, 1165 (9th Cir. 1997) (following *Yee* and declining to dismiss taking claim filed in federal court on ripeness grounds).

CONCLUSION

The *amici curiae* respectfully urge the Court to affirm the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

JOHN D. ECHEVERRIA
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9850

Counsel of Record for Amici Curiae

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In The
Supreme Court of the United States
October Term, 1997

Eastern Enterprises,
Petitioner,
v.

Kenneth S. Apfel,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICUS CURIAE* THE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENTS

Grant Crandall
(Counsel of Record)
United Mine Workers of America
900 15th Street, N.W.,
Washington, DC 20005
(202) 842-7200

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138 Cong. Rec. S3435 (daily ed. March 12, 1992) 18

138 Cong. Rec. D427 22

138 Cong. Rec. S10627 (daily ed. July 29,1992) 23

138 Cong. Rec. S10862 (daily ed. July 30, 1992) 24

138 Cong. Rec. S3022 (daily ed. March 10, 1992) 17

138 Cong. Rec. S3433 *et seq.* (daily ed. Mar. 12, 1992) ... 17-20

138 Cong. Rec. S5081 (daily ed. April 8, 1992) 16, 20

138 Cong. Rec. S5082 (daily ed. April 8, 1992) 21

A Medical Survey of the Bituminous - Coal Industry: Report of the Coal Mines Administration (United States Department of Interior, 1947) 4, 5

Bituminous Coal Facts, 1960 (National Coal Association 1960) 5

Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance, 102d Cong. 102 (Comm. Print 1991) 9, 10, 12-14

Coal Commission Report: A Report to the Secretary of Labor and the American People (November 1990) 5, 11, 12, 26, 27

Comprehensive National Energy Act, H.R. 776 21-24

H.R. 4210, Tax Fairness and Economic Growth Act of 1992. ..... 16, 20, 22

H.R. 4344 22

S.1708, The Coal Industry Health Benefits Stabilization Act of 1989 ..... 10, 21

S.1989, The Coal Industry Retiree Health Benefit Act of 1991 ..... 14-16, 21, 24

S.1989, The Coal Industry Retiree Health Benefit Act of 1991 (revised March, 1992) 16-18, 20, 22

S.2550, United Mine Workers of America Retiree Health Benefit Act of 1992 ..... 20, 21

The American Coal Miner: A Report on Community and Living Conditions in the Coalfields, The President's Commission on Coal, (February 1980) 2, 4

United States Coal Commission: Report of the U.S. Coal Commission. (1925) 3

STATEMENT OF INTEREST

The United Mine Workers of America (the "UMWA"), a national labor organization of over one hundred and thirty thousand members, is dedicated to representing the interests of the nation's coal miners and their families.[1] Since its creation in 1890, the UMWA has sought to provide the nation's miners fair wages, safe working conditions and health and retirement benefits. In particular, for over fifty years, the UMWA has worked to ensure that its working and retired members and their families would be provided with comprehensive health care coverage. It was the UMWA's insistence on such benefits that caused a national labor dispute in 1946 and led to the seizure of the nation's coal mines by the United States. During the period of government control, the first welfare and retirement program was created.

For the next forty years, the UMWA endeavored to maintain these benefits through collective bargaining with coal operators. By the end of the 1980s, however, it became apparent that collective bargaining could not resolve the complex problems confronting the health and retirement program. Congress first recognized the severity of this problem in 1989. The issue of continued benefits for over one hundred thousand beneficiaries was one of the primary causes of the bitter labor dispute between the UMWA and the Pittston Coal Co. As part of the settlement of that dispute, a special commission was created to investigate the growing financial crisis confronting the UMWA Benefit Trusts. After receiving the Commission's report, Congress conducted its

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[1]Counsel for all parties have consented to the filing of this *amicus* brief, and the UMWA has filed those consents with the Clerk of the Court. Sup.Ct.R. 37.3 The UMWA's submission was prepared in part from materials developed by the firm of Mooney, Green, Baker, Gibson and Saindon, P.C. Members of this firm have continuously represented the UMWA in employee benefit matters since approximately ten years prior to the passage of the Coal Act. It has also served as counsel to the Respondent UMWA Combined Benefit Fund on particular matters. No entity other than the UMWA has contributed to the preparation or submission of this brief. Sup.Ct. R.37.6.

own exhaustive review and considered legislative solutions to the crisis. After trying several approaches, Congress eventually enacted the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), *codified in relevant part at*, 26 U.S.C.§ 9701 *et seq*. It is the application of the Coal Act to Eastern Enterprises ("Eastern") that is presented to the Court in this matter.

In view of its unique knowledge of the historical background of the Coal Act, the UMWA can provide the Court with valuable insight into the issues raised by this case. Accordingly, the UMWA's participation may be of assistance to the Court in understanding the factual underpinnings of the Coal Act. In addition, the matter before the Court involves directly the continued provision of health benefits to hundreds of retired coal miners and their spouses and dependents as well as indirectly the health benefits of thousands of other retired coal miners and their spouses and dependents. These retirees were, and many still are, members of the UMWA. Inasmuch as the constitutional questions raised by the Petition will be addressed at length by others, the UMWA's submission focuses primarily on an explication and amplification of the factual background of the Coal Act. The UMWA, as *amicus curiae*, submits its brief in support of the Respondents to support the holding of the First Circuit Court of Appeals, as well as every other federal court to consider the question, that the Coal Act is a constitutional exercise of Congressional power.

STATEMENT OF THE CASE

As recognized by the President's Commission on Coal, "[c]oal is unique among the major energy resources in its close identification with the people who produce it." *The President's Commission on Coal, The American Coal Miner: A Report on Community and Living Conditions in the Coalfields*, iv (1980) (the "*President's Commission*"). Unlike other industries "coal and the coal miner are intertwined in American legend and history." *Id.*

It is this unique industry with its unique history and

problems, as well as the solutions to the those problems, that lie at the heart of this case. In particular, the health care provided to coal miners and their families presents one of the most interesting segments of American industrial and labor history. Starting before the turn of the century, the prevalent system of health care for miners and their families was the "company doctor." These physicians were in the direct employ of mine operators. For many years, the company doctor was often the only health care professional, particularly in the rural communities where coal is often mined. Similar to the company-owned housing that miners and their families lived in, the cost of this care was borne by the miners by direct deductions from their wages. These costs, including deductions for purchases at the company stores, often consumed the bulk of the miners' compensation. *See generally United States Coal Commission: Report of the U.S. Coal Commission* (1925).

1. Krug-Lewis Agreement

In the late 1930s and early 1940s, the UMWA began to demand drastic changes in this system. The issue of the quality of health care for the nations's coal miners came to prominence during the contract negotiations between the UMWA and coal operators in 1946. In its contract proposals, the UMWA demanded the establishment of an independent system to provide for health and welfare benefits. The mine owners refused, and the UMWA commenced a nationwide strike.

As the strike progressed, it caused a severe crisis in the nation and President Truman intervened directly. Invoking the War Labor Disputes Act, he issued an Executive Order directing Secretary of the Interior Julius Krug to seize the mines and continue their operations in the national interest. In addition, the order also authorized Secretary Krug to negotiate with the UMWA. 11 Fed. Reg. 5593 (1946). Acting on behalf of the United States, Secretary Krug entered direct negotiations with the UMWA. Seven days later, Secretary Krug signed the National Bituminous Coal Wage Agreement with UMWA President John L. Lewis at the White House (the "Krug-Lewis Agreement").

The Krug-Lewis Agreement expressly created two new benefit plans: the United Mine Workers of America Welfare and Retirement Fund (the "1946 Fund"), and the United Mine Workers of America Medical and Hospital Fund (the "UMWA Medical and Hospital Fund"). J.A. 261a-263a. The 1946 Fund was intended to provide a wide range of medical and other benefits to working and retired miners and their dependents and survivors. The UMWA Medical and Hospital Fund was designed to make hospital services available to the same population. In the Krug-Lewis Agreement, the United States and the UMWA also agreed to "coordinate the development of policies and working agreements necessary for the effective operation of each fund" so that "each fund [would], to the maximum degree practicable, operate to complement the other." *See United States Department of Interior, A Medical Survey of the Bituminous - Coal Industry: Report of the Coal Mines Administration* (1947), Appendix, 233 (the "*Boone Report*").

The Krug-Lewis Agreement provided miners with two victories regarding health care issues. The first was the creation of the health and retirement fund. The second was the commitment by the United States to undertake directly a review and analysis of the health care in the nation's coal fields. The medical survey provided for in the Krug-Lewis Agreement was conducted by a senior United States Navy medical officer, Rear Admiral Joel T. Boone, under the auspices of the Department of the Interior. J.A. 261a-263a. The *Boone Report* chronicled the deficiencies in a health care delivery system that had not changed appreciably since the time of the 1922 U.S. Coal Commission. Most miners were still treated by company doctors and the miners financed this system by direct deductions from their paychecks. The *Boone Report* also found that fewer than 20% of the mine locations were served by hospitals providing basic medical care. *President's Commission*, at 79.

After reviewing the shocking state of medical care in the coal camps, the *Boone Report* stated, "[i]f it is custom and tradition that miner families shall exist in squalor, it is time for custom and

tradition to be abolished." *Boone Report*, at 59. With the beginning of the new health care system, the UMWA sought to bring an end to that custom and tradition.

2. The 1947 NBCWA

Shortly after the 1946 Fund commenced operations, the UMWA and coal operators entered into a new collective bargaining agreement, effective May 1, 1947 (the "1947 NBCWA"). The 1947 NBCWA provided that the 1947 UMWA Welfare and Retirement Fund (the "1947 Fund"), would succeed the two original funds. Like its predecessors, the 1947 Fund was established to make payments to UMWA miners and their dependents for a broad range of benefits. By the end of December 1948, the 1947 Fund had provided medical benefits and pensions to more than 250,000 coal miners and their families in 26 states. R.A. 1910-11. All in all, the Fund spent more than $100 million to provide for such benefits.

The 1947 Fund expanded the scope of its medical program in 1949. By August 31, 1949, the Fund provided hospitalization and medical care coverage for working, retired, disabled and unemployed miners and their wives, widows and children under age 18. R.A. 1903.

3. The 1950 NBCWA

The 1950 NBCWA created a new multiemployer fund called the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "1950 Fund"). The 1950 NBCWA reflected the parties' understanding that in return for increased mechanization of the nation's coal mines that would substantially reduce mine employment, the coal operators would improve the health benefits and wages of the coal miners. [2] *See Coal Commission Report: A*

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[2]Consistent with the move towards mechanization, unemployment rose quickly in the coal fields. In 1950, there were 415,000 working miners. By 1952, the number dropped to 335,000. The decline continued throughout the 1950s with only 197,000 miners on the job in 1958. *Bituminous Coal Facts, 1960* (National Coal Association 1960) p.116. Employment continued to

Report to the Secretary of Labor and the American People (November 1990) ("*Coal Commission*") J.A.265a. The 1950 Fund succeeded the 1947 Fund.

On July 1, 1950, building upon the program that had been administered by the 1947 Fund, the 1950 Fund introduced a comprehensive hospital and medical care program. The program provided for the payment of unlimited hospitalization and medical care in the hospital for working and unemployed miners; their spouses and children; as well as retired miners and their wives and widows. The program's hospital and medical care coverage for miners' widows terminated only upon their remarriage. R.A. 1900-1967.

By September 1951, the 1950 Fund's medical and hospital care program was in full operation. As explained by Charles A. Owen, the 1950 Fund's management-appointed trustee, in a November 1951 report to the 1950 NBCWA signatory coal operators, the Fund provided a comprehensive scheme of health benefits. Trustee Owen also informed the coal operators that the Fund's medical and hospital benefits covered "Hospitalization, Surgical and Medical Care for mine worker [sic], *including pensioners and dependents during his life, without limit as to duration* ...." R.A. 1971-72; J.A. 132a - 133a[3] (emphasis

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decline in the 1960s and by 1969 there were only 124,500 working miners. J.A. 268a.

[3]Joseph E. Moody, then president of the Southern Coal Producer's Association, discussed the 1950 Fund in an October, 1953 speech containing the following passages:

> I hesitate to speculate on what might happen if the Coal Welfare Fund again goes broke... But depriving some 400,000 persons of benefits they have been promised grown accustomed to, could be political as well as social dynamite. It is entirely conceivable that Congress, with an eye to the danger of complete disruption of the domestic coal industry -- and to the votes involved -- might decide it was necessary to step in and take over the mines... [p]erhaps legislation by Congress is necessary to proscribe [sic] sound restrictions under which such

supplied).

4. The Establishment of the UMWA 1950 and 1974 Benefit Trusts

The 1950 Fund continued to provide health benefits until the 1974 NBCWA. At that time, partly in response to the enactment of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, the coal operators and the UMWA agreed to divide the 1950 Fund into four separate multiemployer plans. Two of the new plans provided pension benefits to retired miners. The other two plans – the United Mine Workers of America 1950 Benefit Trust (the "1950 Benefit Trust") and the United Mine Workers of America 1974 Benefit Trust (the "1974 Benefit Trust") (collectively the "UMWA Benefit Trusts") - provided health benefits to retired miners. J.A. 269a. The agreement also continued the program of lifetime healthcare.[4]

> benefit plans can operate; but if it is, we as businessmen and Americans must see that such legislation is passed. R.A. 1899, 2000-01.

[4]Contrary to the suggestions made by petitioner and several *amicus curiae*, the promise of lifetime benefits did not originate in the 1974 NBCWA. Although the '74 agreement contained a negotiated plan of benefits that replaced Trustee-established benefit levels, there was no question that the retirees had previously been promised lifetime benefits. J.A. 132a-134a. Federal courts consistently have held that the UMWA retirees are entitled to lifetime health benefits. *See, e.g., United Mine Workers of America v. Nobel*, 720 F.Supp. 1169 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), where the court held that:

> [P]ension benefits for retired miners were provided beginning in 1947, under the previous trust, and health benefits were provided to retired miners beginning no later than 1950. The pension and health benefits for retired miners were provided throughout the life of the miner. *Id.* at 1178.

The court also stated that:

> The language of the plan benefits contained in the past five collective bargaining agreements between the UMWA and the BCOA, providing that a pensioner will be entitled to a health services card for life,

The UMWA and the coal operators restructured the 1974 Benefit Trust in the 1978 NBCWA. In that contract, signatory employers agreed to establish individual employer health plans to provide benefits to their active employees and retirees. Thus, the UMWA and the coal operators shifted primary responsibility for providing health benefits for post-1975 retirees and the active work force from the 1974 Benefit Trust to the coal operators that were signatory to the 1978 NBCWA and successor agreements. The 1950 Benefit Trust continued to provide health benefits to pre-1976 retirees, and the 1974 Benefit Trust was retained as an "orphan" plan to provide retiree health benefits to post-1975 UMWA retirees whose last employer had gone out of business. J.A. 271a-272a.

5. The Crisis in the UMWA Benefit Trusts

During the last decade, the UMWA Benefit Trusts experienced a financial crisis that threatened their continued existence. Although there were various reasons for this crisis, the principal reason was the steadily declining base of contributing employers combined with the drastically increasing cost of health benefits for the aged population of the Trusts.

By the late 1980s, these factors seriously jeopardized the Trusts' ability to continue providing benefits, thereby causing substantial disruption in the nation's coal fields. The resulting uncertainty and instability gave rise to significant labor disputes. The most notorious of these labor disputes was the 1989 strike against the Pittston Coal Co. *See generally UMWA v. Bagwell*, 512 U.S. 821 (1994). The history of that strike is particularly relevant to the passage of the Coal Act and illustrates the need for legislative action.

The UMWA and Pittston had maintained a collective

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together with the 25-year history of lifetime benefits prior to 1974, and the testimony of the parties of record establish that the parties intended to provide health benefits to the individual plaintiffs for life. *Id.* at 1173. (emphasis supplied).

bargaining relationship for many years. Prior to 1987, however, Pittston had not bargained directly with the UMWA but had authorized the BCOA to bargain on its behalf. In 1987, Pittston, then a signatory to the 1984 NBCWA and a member of BCOA, decided to withdraw from the BCOA and negotiate independently with the UMWA.

When the 1984 contract expired in February 1988, the miners at Pittston continued to work while negotiations for a successor agreement ensued. Negotiations between Pittston and the UMWA revealed major areas of disagreement, primarily in the area of medical and pension benefits. Indeed, during the course of the negotiations, although Pittston repeatedly stated that it was willing to "pay for its own" retirees' health care, it took the position that it would no longer participate in the multiemployer benefit plans.

The negotiations between the parties continued without reaching agreement and in April of 1989 the miners at Pittston commenced an unfair labor practice strike. The unrest caused by this dispute permeated not only the nation's coal fields but the entire country. Primarily as a result of the retiree health care issue, national and international attention became focused on the Pittston strike. Thousands of UMWA supporters, including labor, religious and civil rights leaders, were arrested during the strike. "It was to be one of the most bitter strikes in recent labor history." *Coal Commission Report on Health Benefits of Retired Miners: Hearing Before the Subcommittee on Medicare and Long-Term Care of the Senate Committee on Finance*, 102d Cong., 1st Sess. 319 (1991) ("*1991 Subcommittee Hearings*").

The escalation of strike activity led Secretary of Labor Elizabeth Dole to become involved in the Pittston strike. After meeting with striking miners and retirees, as well as both Pittston and the UMWA, she announced that she would appoint a "super mediator" to attempt to resolve the strike. Secretary Dole directed William J. Usery, Secretary of Labor during the Ford Administration, to mediate this serious dispute. *1991*

Subcommittee Hearings, at 303.[5] Throughout the subsequent negotiations monitored and supervised by Secretary Usery, it became apparent that the problem of retiree health care was incapable of resolution through the collective bargaining process. After the tireless efforts of Secretary Usery, the parties were able to reach a new agreement, although that agreement was subsequently rejected by the UMWA Trusts. *Id.* at 304.

In announcing the agreement, Secretary Dole recognized that, during the strike and settlement negotiations, it had become clear that the overriding issue of concern was the longstanding security of the health care benefits of the miners, retirees and their families. As she stated, "[t]his is an issue larger than the Pittston dispute." Consequently, when the settlement was announced at the Department of Labor, she also announced that she would be appointing a blue ribbon commission to review the health care issues and to make recommendations to resolve them. Secretary Dole subsequently appointed former Secretary Usery as the Chair of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission").

6. The Coal Commission

The Coal Act traces its origins to the November 5, 1990 report of the Coal Commission. J.A. 231a-344a. In carrying out its responsibilities, the Coal Commission conducted an exhaustive study of the issues that confronted the UMWA retiree health care delivery system.

After completing its review, the Coal Commission determined that:

> the combination of skyrocketing health care costs, an increasing number of retirees who have been abandoned by their employers, and a smaller percentage of coal producers making contributions to the UMWA Funds have put the health care program for retirees in a financial crisis. J.A. 236a.

Having identified the causes of the funding crisis that jeopardized the UMWA retiree health care delivery program, the Coal Commission next considered possible solutions. In so doing, the Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution:

> [t]he escalating cost of providing adequate health care to coal miners and their families, particularly the increasing population of orphan retirees, cannot properly or fairly be solved by the parties through collective bargaining alone. J.A. 321a, *see also* J.A. 247a, 366a.

The Coal Commission therefore concluded that the continued delivery and financing of health care in the coal industry would require:

> the imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree health care obligation, authority to utilize excess pension assets and the implementation of state-of-the-art managed care and cost containment techniques. J.A. 306a.

The Commission recommended two alternative statutory approaches. The first approach called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to provide health care for

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[5]During the course of the strike, Senators Byrd, Heinz and Rockefeller introduced a bill that for the first time sought to impose a legislative solution to the crisis in the retiree health care system, S.1708, the Coal Industry Health Benefits Stabilization Act of 1989. *See* 135 Cong. Rec. S12313, S12340 (daily ed. October 2, 1989). A companion bill was introduced by Representative Boucher on October 5, 1989. *See* 135 Cong. Rec. H6987 (daily ed. October 12, 1989). The proposed legislation was Congress' first effort to resolve the financial crisis jeopardizing the health care of over one hundred thousand retired miners and their families. Although the bill contained 8 sections, it had two critical components. The first provided a mechanism for the transfer of "surplus assets" from the UMWA 1950 Pension Plan to the UMWA Benefit Trusts, and the second imposed a statutory obligation upon certain NBCWA signatory employers to continue financing the UMWA Benefit Trusts.

UMWA orphan retirees; and (2) a private multi-employer fund financed by current and former NBCWA signatories to provide health care to UMWA retirees. J.A. 306a-311a. Under the second approach, the Coal Commission recommended the creation of a single, private multi-employer plan to provide health benefits to orphan retirees. The approach contained a financing scheme that imposed liability upon all employers and their related business entities that were, at one time, signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, this plan seeks additional revenues from a broadened base of current and past signatories to the contracts. J.A. 312(a).

7. Congressional Response to Coal Commission Report

After the completion of the Coal Commission's charge, Congress began its own exhaustive examination of the retiree health care crisis. On September 25, 1991, the Subcommittee on Medicare and Long-Term Care of the Senate Finance Committee held a hearing to consider the report and recommendations of the Coal Commission. In his opening remarks, Subcommittee Chairman Rockefeller reiterated that the UMWA Benefit Trusts were in grave financial condition. Senator Rockefeller also expressed his unequivocal intention to ensure that the crisis would be remedied:

> I simply suggest to you that this problem affects the entire industry and in fact the entire country. There is an industry interest, there is a national interest in resolving this problem, and I hope all concerned will be involved constructively.... We are talking about tens of thousands of elderly and often infirm people who long ago earned these benefits by firing the furnaces of American industry in war and in peace. *The industry and national commitments to health care for these miners and their families must and will be kept. 1991 Subcommittee Hearings*, pp. 2-3. (emphasis supplied).

Several individuals testified at the Subcommittee hearing,

including retired miners and their wives. Dixie Woolum, the widow of a miner who had mined coal for Massey Coal Company for 45 years, testified that:

> My husband, Jimmy, worked in the mines for the same coal company for 45 years. He died when he was sixty years old, three months after his last working day. ... He gave his life in the mines. I packed his dinner bucket and got him off to work every day for 45 years. Then to show how much they cared Massey Coal Company took my insurance card away in 1984. Finally after years without health benefits, the funds picked up my coverage. ... I was born in a coal-company house. We raised our family in a company house and I remember when we got the UMWA funds. ... After we got the funds Jimmy always said to me, "Dixie, if anything should happen to me, you and the kids will be taken care of." This is what they promised him and that is what we planned on and what we believed. *1991 Subcommittee Hearings*, at 4.[6]

In addition to retired miners and dependents, a number of others testified at the Subcommittee hearing including Professor Henry H. Perrit, Jr., a noted labor law expert from Villanova University and the Vice Chair of the Coal Commission. Professor Perrit explained that the Coal Commission reached a consensus on

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[6]UMWA retiree Homer Eckley provided similar testimony at the hearing:

> I grew up in a coal mining family, four generations of them. That was back when there was no benefits, nothing. I went into the Service and my dad went on strike, and when he came back they had benefits -- pension and hospitalization. *I went into the mine with the idea that when my time came, I could retire and have benefits, plus a pension.* ... Now they tell me that my mine was sold to another company and they are complaining about paying these benefits. I disagree. The entire coal industry is part of the problem and the entire coal industry should be part of the solution. *1991 Subcommittee Hearings*, at 5. (emphasis supplied).

several important issues. He stated that:

> The bottom line is that appropriate Government action to stabilize the financing of the retiree health care system in this industry, if it is to be done right, encourages private solutions to health care problems, honors commitments to retirees who worked hard to create economic prosperity for others, and encourages private sector innovation to ensure equitable access to high quality and cost effective health care at reasonable cost. ... Government action is necessary -- and every member of the Committee recognized this -- because collective bargaining cannot solve this problem. *1991 Subcommittee Hearings*, at 10.[7]

Secretary Usery also provided a written statement to the Subcommittee. Like Professor Perrit, Secretary Usery concluded that the collective bargaining process was inadequate to resolve the issue of retiree health care in the coal industry:

> In other circumstances, I would probably feel confident in saying that free collective bargaining alone can lead us out of the health care mess the coal industry faces today. ... The Federal Government, which was one of the parties to the creation of the existing health care apparatus in the coal industry, must take action -- through legislation and executive action, if necessary -- to prevent widespread dislocation and misery. *Id.* at 304.

8. Senate Bill No. 1989 -- Original Version

On November 19, 1991, approximately one month after the Subcommittee hearings concerning the Coal Commission report, Senator Rockefeller introduced S.1989, legislation incorporating many of the provisions set forth in the Coal Commission's first recommendation, The Coal Industry Retiree Health Benefit Act

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[7]Several other individuals and coal industry representatives testified in support of the Coal Commission's recommendations, including BCOA Chairman Michael Reilly. Mr. Reilly stated that NBCWA signatories "have a moral obligation to the funds." *1991 Subcommittee Hearings*, at 48.

of 1991, 137 Cong. Rec. S17061 (daily ed. Nov. 19, 1991). Senator Rockefeller stressed that:

> . . . the principle at stake here is actually quite simple: keeping commitments. We are talking about thousands of elderly, retired miners who spent their lives laboring to carve coal out of the Earth to create energy and comfort for the rest of the Nation. We are talking about widows. We are talking about their dependents. As the Secretary of Labor's Coal Commission said, we have thousands of people, entitled to health benefits, and the commitment to those beneficiaries must be honored. The rest is drafting details. 137 Cong. Rec. S17061 (daily ed. Nov. 19, 1991).

Under S.1989, as recommended by the Coal Commission, the UMWA Benefit Trusts were to be replaced by two entirely new entities, a government corporation called the Coal Industry Health Benefit Corporation (the "Corporation"), and a private welfare benefit plan called the 1991 Benefit Fund (the "1991 Fund"). S.1989 also provided for the transfer of "excess assets" from the UMWA 1950 Pension Plan to eliminate the deficits in the UMWA Benefit Trusts and to provide start-up costs for the new entities.

The provisions concerning eligibility for benefits from the Corporation are notable both for their complexity and their scope. Under S.1989, the Corporation's beneficiary population consisted of "orphaned" retired miners (and their dependents) who had been engaged in the production of coal, regardless of whether they were represented by the UMWA and regardless of whether they worked for an NBCWA or former NBCWA signatory employer. S.1989 § 9711.

S.1989 contained a complex, two-part funding mechanism that had an industry-wide scope. Specifically, the first part consisted of an industry-wide fee or "premium" obligation, including an equivalent fee on imported coal, that was imposed on all coal industry employers; the second part consisted of a "per beneficiary" premium that was imposed only upon "Last Signatory Operators" (as defined in § 9723(b)) to whom

Corporation beneficiaries could be attributed. S.1989 § 9704(g), 137 Cong. Rec. S17065 (daily ed. Nov. 19, 1991). The introduction of this dual financing mechanism heralded the "pay for your own" concept that runs throughout the legislative history of the Coal Act.

The second major component of S.1989 imposed obligations upon Last Signatory Operators that were required to maintain individual employer plans pursuant to the 1978 or later NBCWAs. S.1989 § 9714(a), (b). The last major piece of the legislation was the creation of the 1991 Benefit Fund. S.1989 § 9713. The 1991 Benefit Fund was to be created by the merger of the UMWA Benefit Trusts and was to be an employee welfare benefit plan and a multi-employer plan, as defined in ERISA. S.1989 § 9713(a)(1). The settlors of the Fund, *i.e.*, the UMWA and the BCOA, were authorized to design the structure and administration of the 1991 Benefit Fund. S.1989 § 9713(a)(2). The 1991 Benefit Fund would have been required to maintain the same level of benefits as was provided under the UMWA Benefit Trusts. S.1989 § 9713(c)(1).

S.1989 would have authorized the 1991 Benefit Fund's trustees to set a fixed monthly assessment each year. S.1989 § 9713(d). Each Last Signatory Operator required to contribute to the 1991 Benefit Fund had to pay these monthly assessments. S.1989 § 9713(d)(2). Finally, S.1989 also provided for the transfers of "excess pension assets" from the UMWA 1950 Pension Plan.

9. Senate Bill 1989 -- March 1992 Version

S.1989 was revised in March, 1992 in order to accommodate objections from other Senators, particularly those from western states. *See* 138 Cong. Rec. S5081 (statement of Senator Boren) (daily ed. April 8, 1992). The tax provisions set forth in Senator Rockefeller's revised legislation were included in Title VI of the Tax Fairness and Economic Growth Act of 1992, H.R. 4210. Although the substantive provisions creating a new tri-partite retiree health care system remained intact, the Corporation's

financing provisions were changed in three significant ways.

First, the revised version of S.1989 ("Revised S.1989") imposed an industry-wide premium and an import fee only upon domestic and foreign bituminous coal, excluding subbituminous and lignite coal.[8] *See* Revised S.1989, § 9704(g)(1)(A), 138 Cong. Rec. S3022 (daily ed. March 10, 1992).

Second, the revised version of S.1989 created a two-tiered industry-wide premium. In the new proposal, the premium for bituminous coal produced in "eastern" states, generally states east of the Mississippi River, would have been $0.99 per hour. The premium for bituminous coal produced in "western" states, *i.e.*, all states west of the Mississippi River except for Montana and Texas, however, would have been $0.15 per hour. *See* Revised S.1989 § 9704(g)(1)(A)(i), (ii).[9]

Third, the revised version of S.1989 exempted lignite coal operators that had ceased to mine bituminous and sub-bituminous coal prior to January 1, 1992. Revised S.1989 § 9704(g)(1)(C)(vi).

During debate on S.1989, Senator Wallop, the Bush Administration's leading Congressional spokesman on the proposed legislation, expressed his strong opposition to the use of industry-wide premiums to finance the statute. *See* 138 Cong. Rec. S3433 (daily ed. Mar. 12, 1992). Specifically, Senator Wallop took issue with the imposition of such a tax on the grounds it would have required the entire coal industry to pay for the health care of the UMWA retirees, regardless of whether the

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[8]Although the revised legislation imposed premium liability only upon domestic and imported bituminous coal, the Corporation was still required to provide coverage to "orphan" miners who performed work in the subbituminous and lignite coal sectors. *See* Revised S.1989 § 9711(b)(1)(E)(i).

[9]Under the revised version of the bill, the fee on imported coal was also raised from $0.15 per ton to $0.25 per ton. Revised S.1989 § 9704(g)(1)(B)(ii), 138 Cong. Rec. S3022 (daily ed. March 10, 1992).

affected coal operators ever had any relationship with the UMWA and UMWA retirees, and regardless of whether they were ever signatory to an NBCWA. *Id.*[10]

Senator Wallop was particularly troubled by the use of such an industry-wide premium in light of the bill's funding exemption for lignite and subbituminous coal operators, and its exclusion of Texas and Montana. 138 Cong. Rec S3433 (daily ed. March 12, 1992); *see* Revised S.1989 § 9704(g)(1)(C)(vi). Senator Wallop was concerned that the remaining coal operators would have to shoulder the burden of providing health benefits for the orphan retirees of the exempted operators. 138 Cong. Rec. S3433 (daily ed. March 17, 1992).

Senators Boren, Dole and Simpson also opposed Senator Rockefeller's proposed legislation. Senator Boren stated that the proposed legislation would set "a precedent that companies that were not parties to a particular collective bargaining agreement shall now have liabilities as a result of agreements that other parties entered into." 138 Cong. Rec. S3434 (daily ed. March 12, 1992). Senator Dole likewise commented that the proposed legislation set "a new standard in bad public policy." 138 Cong. Rec. S3435 (daily ed. March 12, 1992).

Senator Simpson was also highly critical of the industry-wide fee provisions set forth in the proposed legislation. He stated that:[11]

> The coal tax provision in this bill is a singular attempt to bail out a privately negotiated union health plan in a fashion that

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[10]Senator Wallop's opposition to the use of an industry-wide premium evidenced his more fundamental opposition to the legislation's goal of providing retiree health care benefits for all retired miners, not just retired UMWA miners. 138 Cong. Rec. S3433 (daily ed. March 17, 1992).

[11]Although he opposed Senator Rockefeller's proposed legislation, Senator Simpson stated that UMWA miners "are in every sense entitled to the health benefits that were promised them in collective bargaining by their employers. None of us here disputes that." *Id.*

> would violate the most fundamental principles of collective bargaining and simultaneously turn inside out the economic dynamics of a highly competitive industry. 138 Cong. Rec. S3439 (daily ed. March 12, 1992).

Senators Rockefeller and Byrd raised a vigorous defense of the proposed bill. Senator Rockefeller stated that:

> All we attempt to do in this amendment is what ought to be done, is to put no burden on the U.S. Government, on the U.S. taxpayer, but to say that the coal industry, as has always been the case, should take care of its own. This has always been the case with the coal industry, and this should continue to be the case. 138 Cong. Rec. S3436 (daily ed. March 12, 1992).

Expressing his "regret that certain compromises had to be made to secure approval of the heart of S.1989 by the Finance Committee," Senator Byrd similarly stated that Congress' failure to enact the proposed legislation to ensure the continued provision of health care benefits to retired miners and their dependents "would be unconscionable." 138 Cong. Rec. S3436 (daily ed. March 12, 1992). Senator Byrd further stated that:

> What this effort is all about . . . is to ensure that those who are responsible assume their responsibility. Any company that is currently in business would be made to assume responsibility for the health care costs of its retirees, irrespective of whether it had previously succeeded in dumping liability for its retirees on others.

138 Cong. Rec. S3438 (daily ed. March 12, 1992).

Finally, Senator Wofford stated that:

> The health benefits provided to coal miners under this bill are nothing more than what they are due. They worked hard for their retirement years. They have earned some peace of mind and a decent, healthy quality of life. This is not a handout. This is not a giveaway. This legislation represents nothing more than a promise kept, a commitment honored." 137

Cong. Rec. S3438 (daily ed. March 12, 1992).[12]

H.R. 4210 (including Revised S.1989) was passed by both houses of Congress on March 20, 1992. President Bush vetoed the legislation the same day.

10. The Boren Amendment: S.2550

Legislative efforts to solve the crisis confronting the beneficiaries did not stop with President Bush's veto. On April 8, 1992, Senators Boren, Dole and Wallop introduced S.2550, substitute legislation that was markedly different from Senator Rockefeller's proposal. *See* 138 Cong. Rec. S5081 (daily ed. April 8, 1992). Unlike Senator Rockefeller, Senator Boren identified the problem requiring Congressional attention as one that affected only the UMWA Benefit Trusts and that involved only the unionized sector of the coal industry. Senator Boren expressed particular concern over the concept that "companies that were not parties to a particular collective bargaining agreement would be legally required to meet certain contractual obligations...." *Id.* He was further troubled by the "provisions establishing various exemptions and tax rates that differed according to geographic region." *Id.*

Senator Dole similarly criticized Senator Rockefeller's proposed legislation. In this regard, Senator Dole stated that it was "unprecedented and unacceptable" legislation because it imposed:

> A penalty on innocent bystanders -- non-BCOA companies and non-UMW employees -- whose only connection to this dispute is that they coincidentally mine coal." 138 Cong. Rec. S5082 (daily ed. April 8, 1992).

S.2550, entitled the "United Mine Workers of America Retiree Health Benefit Act of 1992," was designed solely to address the funding crisis within the UMWA 1950 and 1974 Benefit Trusts without changing the then current structure. *See* S.2550 § 2. S.2550 consisted of four components, some of which were similar to the provisions set forth in the Coal Industry Retiree Health Benefit Act of 1991 (S.1989), and others of which bore a resemblance to the provisions set forth in the Health Benefit Stabilization Act of 1989 (S.1708).

Initially, the bill required the transfer of excess assets of the UMWA 1950 Pension Plan to the Benefit Trusts. In addition, the bill would have required the imposition of withdrawal liability upon all employers that were signatory to the 1988 or later NBCWAs who withdraw from the UMWA 1950 and 1974 Benefit Trusts. S.2550 § 4501(a).

The third component required employers to continue contributing to the Benefit Trusts at rates established by the UMWA and BCOA. S.2550 § 4512(a). The final component of Senator Boren's proposed legislation would have required the trustees of the UMWA Benefit Trusts to adopt mandatory cost containment measures under the guidance of the Secretary of Health and Human Services. S.2550 § 5.

Senator Boren's proposed legislation did not gain widespread support. Its fundamental flaw was that it continued to place exclusive funding responsibility on the 1988 NBCWA signatories and failed to broaden the contribution base. Thus, it did not address the critical problems identified by the Coal Commission.

11. The Energy Bill -- H.R. 776

On February 4, 1991, the "Comprehensive National Energy Act" H.R. 776, (the "Energy Bill") was introduced in the House of Representatives. *See* 137 Cong. Rec. E381 (Feb. 4, 1991). After it was passed in the House, the bill was directed to the Senate, where, on June 4, 1992, its revenue provisions were

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[12]Responding to criticism of the proposed legislation, Senator Specter, another strong supporter of the proposed legislation, noted that:

> on many occasions in our society we structure our laws which help those who are in special need even though those who are making the payments do not have any direct responsibility. In our society, the laws do impose obligations on people to take care of those who are in great or are in extreme need. 137 Cong. Rec. S3439 (daily ed. March 12, 1992).

assigned to the Senate Finance Committee. At that time, the bill did not contain any coal industry retiree health care provisions. The Senate Finance Committee, however, added the provisions contained in the March, 1992 version of S.1989 to the bill.

a. Incorporation of AMR Fees Proposal

Prior to the veto of H.R. 4210, Representative Rahall had introduced legislation extending the duration of the Abandoned Mine Reclamation Fund ("AMR Fund") from 1995 to 2007. H.R. 4344. In addition, it required the transfer of $50 million from the AMR Fund each fiscal year to the "Coal Industry Retiree Benefit Fund," *i.e.*, the Corporation proposed in S.1989. Representative Rahall's AMR proposal found its way into the Energy Bill. As modified in the version of the Energy Bill reported out of the committee, Rahall's proposal required that the duration of contributions to the AMR Fund be extended to 2001. It continued to require that the AMR Fund transfer $50 million to the Corporation each fiscal year. *See* 138 Cong. Rec. D427.

b. The Senate Finance Committee Version

On June 16, 1992, substitute revenue provisions of the Energy Bill were reported favorably out of the Senate Finance Committee. The substitute provisions included a slightly modified version of Senator Rockefeller's S.1989 as it existed on March 20, 1992. These modifications involved the amount of premiums that would be payable to the Corporation.

Specifically, this version required the payment of higher industry-wide premiums for both domestic and imported bituminous coal, and eliminated the exclusion of Texas and Montana. It also set the specific amount of the per beneficiary premiums payable by last signatory operators to the 1991 Benefit Fund. All of the other substantive terms contained in the March 20, 1992 version remained the same, including the lignite and subbituminous coal exception that had concerned Senator Wallop.

c. The Subsequent Floor Amendment Version-The Coal Act

On July 29, 1992, Senator Rockefeller introduced a floor

amendment to the revenue provisions of the Energy Act that had recently been reported out of the Senate Finance Committee. This floor amendment, which was passed by the Senate by voice vote, became the final version of the Coal Act. *See* 138 Cong. Rec. S10627 (daily ed. July 29,1992).

Like the prior versions of Senator Rockefeller's proposals, the final version of the Coal Act dismantled the private, multiemployer retiree health care structure that had existed for more than forty years. Unlike the prior versions, however, the final version contemplated retiree health coverage for only UMWA retirees and their dependents who had been receiving or would have been eligible to receive retiree health benefits in accordance with the contractual multiemployer health care system that had been established and maintained pursuant to the NBCWAs. Additionally, the government corporation that had been contemplated in the earlier version was replaced with entirely new private, multiemployer plans that provided benefits only to UMWA retirees and their dependents.

Under the final version of the Coal Act, the controversial industry-wide financing provisions were eliminated and replaced by "per beneficiary premiums" that were based on the number of plan beneficiaries attributable to each responsible employer. Thus, the "pay for your own" concept that had existed in every prior version become the overriding principle in the final version of the Coal Act. Accordingly, employers that had never been signatory to a UMWA agreement were relieved of all obligations under the final version.

Unlike the prior versions, the final version of the Coal Act contained provisions for the transfer of funds from the AMR Fund and the duration of the AMR Fund was extended to 2004. In addition, the amount of the transfers from the AMR Fund was increased, but the yearly transfers were postponed until October 1, 1995.

d. Debate and Passage

The Senate passed its version of the Energy Act on July 30,

1992. *See* 138 Cong. Rec. S10862 (daily ed. July 30, 1992). Because the Coal Act was not included in the House version of the Energy Bill, it was sent to a House-Senate Conference Committee.

The Conference Committee adopted the Senate's version of the Coal Act without any changes. The Conference Report was approved by the House on October 5, 1992, but not without strong opposition from certain members of the House. 138 Cong. Rec. H11408 (daily ed. Oct. 5, 1992).

The Senate adopted the Conference Report on October 8, 1992. Senator Rockefeller, stating that "the agreement is now honored," reviewed the arduous and often contentious history of the Coal Act. 138 Cong. Rec. S17632 (daily ed. Oct. 8, 1992). He explained that:

> The funding mechanism in [the final version of the Coal Act] is the one proposed by the [Bush] administration and on which the administration insisted. The accommodation was embodied in legislation that passed the Senate as part of the omnibus energy bill on July 29, 1992.
>
> While the approach taken by this measure is significantly different from [the original version of] S.1989, it is within the scope of the basic alternatives recommended by the [Coal] Commission. Instead of including a broad industry wide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies. Some interests objected to the tax; others to the so-called reach-back approach of the present legislation. Both approaches are defensible and rational. The decision ultimately rested on the best basis for consensus in the legislative process.

138 Cong. Rec. S17633 (daily ed. Oct. 8, 1992).

President Bush signed the Energy Act on October 24, 1992 and the Coal Act became law.

SUMMARY OF THE ARGUMENT

The Coal Act does not violate the Due Process Clause of the Fifth Amendment. In reviewing economic legislation to determine whether it satisfies the requirements of due process, courts must accord Congress great deference. The choices made by Congress in enacting legislation are not subject to challenge unless they are irrational. In view of the fifty year history of the health care system first established by the historic Krug-Lewis Agreement, and the exhaustive examinations of the problems by both the bipartisan Coal Commission and Congress itself, the statutory scheme embodied in the Coal Act is a rational exercise of Congressional authority.

Similarly, a review of the three pronged test to be applied when reviewing economic legislation demonstrates that the Coal Act does not take Petitioner Eastern's property in violation of the Fifth Amendment. Because Eastern is only responsible for its own retirees, the impact of the statute on Eastern is consistent with its level of involvement with the Benefit Trusts. Moreover, given the degree of direct government involvement in the coal industry and the various Trusts, it would be unreasonable for Eastern to assume it could forever avoid responsibility for its own retirees.

ARGUMENT

I. The Coal Act is a Rational Exercise of Congressional Authority

In urging this Court to declare the Coal Act unconstitutional, petitioner and *amici* fail to acknowledge the "strong deference" courts must accord Congress with respect to its economic legislative determinations. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). This judicial deference, reflecting an unwillingness to second-guess Congressional determinations, is premised on Congress' special role under the Constitution. *See* U.S. Const., Art. I, § 1. In light of this constitutional command, this Court has emphatically proscribed any "intrusion by the judiciary into the realm of

legislative value judgments." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Indeed, as this Court cautioned in *Ferguson*, courts do not "sit as a superlegislature to weigh the wisdom of legislation." *Id.* at 731 (citation omitted). *See also Fullilove v. Klutznick*, 448 U.S. 448 (1980) (rejecting claim that Congress must, as a matter of constitutional law, determine whether proposed legislation is supported by a factual "record.").

These principles were reaffirmed in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). That case held that economic legislative choices are "not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. The Court reasoned that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id. See also Heller v. Doe*, 509 U.S. 312, 321 (1993) (noting that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends").

In the case of the Coal Act, after having had the benefit of the Coal Commission's Report, Congress conducted an exhaustive, two-year examination of the crisis in the UMWA Benefit Trusts. Inasmuch as the Coal Act reflects Congress' rational determination that all NBCWA signatory employers bear some degree of responsibility for the health care crisis facing the retirees and their families, it comports with the with Due Process Clause of the Fifth Amendment. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (rejecting constitutional challenge to the Black Lung Benefits Act of 1992, 30 U.S.C.§§ 901-945); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (rejecting attack on Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.*).

II. The Coal Act Does Not Violate the Takings Clause

In discussing the appropriate standard to determine whether economic legislation violates the Takings Clause, this Court has stated that there is no set formula, and that it relies upon "*ad hoc*, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986). Nevertheless, three factors have been identified as having particular significance,

> (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* at 225 (citations omitted).

Application of the principles set forth in *Connolly* leads to the inescapable conclusion that the Coal Act does not violate the Takings Clause. First, with respect to the nature of the governmental action involved -- requiring Eastern and other assigned operators to pay their fair share of the costs of providing health care benefits to their UMWA retirees -- Congress imposed on them an obligation that is proportional to their involvement with the UMWA Benefit Trusts. By requiring assigned operators to spend sums of money to finance health benefits for the Coal Act's beneficiaries, Congress has merely enacted legislation designed to ensure the continuation of a health benefits program that Eastern and other assigned operators voluntarily participated in. A program that caused "[r]etired coal miners to have legitimate expectations of health care benefits for life...." *Coal Commission*, J.A. 245a.

Second, with respect to the severity of the Act's impact, although it unquestionably "deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability," *Connolly*, 475 U.S. at 225, the Coal Act, to the maximum extent possible, imposes liability that is directly related to the employment relationship between Eastern and its former employees who are now Combined Fund beneficiaries.

Finally, the Coal Act cannot be said to so interfere with Eastern's reasonable investment-backed expectations that there is a violation of the Takings Clause. Just as the employer-appellant in *Connolly* voluntarily elected to participate in a multiemployer pension plan to reap the economic benefits of providing promised benefits through the use of pooled assets, Eastern voluntarily chose to finance benefits by pooling its assets in a multiemployer benefit plan. In light of the pervasive nature of the government's significant involvement and regulation of the coal industry, and the UMWA Trusts in particular, any expectation that Eastern may have had that it could forever shirk its responsibilities to its retirees, would have been unreasonable. *See also Concrete Pipe*, 508 U.S. at 641-47.

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling below.

Respectfully submitted,

Grant Crandall
(Counsel of Record)
United Mine Workers of America
900 15th Street, N.W.
Washington, DC 20005
(202) 842-7200

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IN THE
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OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF AMICI CURIAE OF THE OHIO VALLEY COAL COMPANY AND MAPLE CREEK MINING, INC. IN SUPPORT OF RESPONDENTS

JOHN G. ROBERTS, JR.*
MATTHEW A. LAMBERTI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Amici Curiae

* Counsel of Record

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BRIEF AMICI CURIAE OF THE OHIO VALLEY COAL COMPANY AND MAPLE CREEK MINING, INC. IN SUPPORT OF RESPONDENTS

The Ohio Valley Coal Company and Maple Creek Mining, Inc., file this brief as amici curiae in support of the respondents. Each of the parties has consented to the filing of this brief, and the letters of consent have been lodged with the Clerk of this Court.*

* Pursuant to S. Ct. Rule 37.6, counsel for amici certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Valley Coal Company ("OVCC") and Maple Creek Mining, Inc. ("MCM") are small, independent coal mining companies operating in eastern Ohio and western Pennsylvania, respectively. OVCC began operations in 1970 as The Nacco Mining Company ("Nacco"); Nacco changed its name to OVCC in 1988. OVCC currently employs 358 miners represented by the United Mine Workers of America ("the UMWA").

OVCC is not a member of the Bituminous Coal Operators' Association, Inc. ("BCOA")—the multi-employer bargaining unit that has, since 1950, negotiated every National Bituminous Coal Wage Agreement ("NBCWA") with the UMWA. Rather, like many other small and medium-sized coal mining companies, OVCC has agreed through what are commonly called "me-too" agreements to be bound by the terms of the NBCWA, as modified by certain memoranda of understanding between OVCC and the UMWA. *See generally KenAmerican Resources, Inc.* v. *International Union, UMWA*, 99 F.3d 1161 (D.C. Cir. 1996). A "me-too" agreement is a contract identical to one negotiated by a union and multi-employer bargaining unit, signed by an employer who is not a member of that unit. That employer may enter into the "me-too" agreement either before or after the union and the multi-employer bargaining unit negotiate the master agreement.

In the year prior to the passage of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ("the Coal Act"), OVCC paid $1,981,756.85 into benefit trusts for medical benefits for retired miners who never even worked for OVCC. Currently, OVCC pays $71,485.40 a year for such benefits. If this Court were to strike down the Coal Act as unconstitutional and return the industry to the pre-Act regime, OVCC would have to pay between $2,000,000 and $3,000,000 in additional liability each year. For 1997, for example, OVCC projects that, in the

absence of the Coal Act, it would have been forced to pay an extra $2,500,000 for health benefits for retired miners.

MCM has only been operating since 1995, and has a total retained deficit of several million dollars. It employs 363 UMWA-represented miners. Like OVCC, it is not a member of the BCOA, but has agreed to be bound by the NBCWA negotiated by the BCOA and the UMWA, as modified by certain memoranda of understanding. Currently, MCM pays $66,499.20 a year for health benefits for retired miners who never worked for it. Without the Coal Act, MCM estimates that it would be forced to disburse an additional $2,300,000 a year for such miners.

Both OVCC and MCM have entered into long-term sales contracts (up to eight years) for the sale of coal, on the basis of prices that do not factor in liability for funding retiree medical benefits for other companies. If the Coal Act is overturned and OVCC and MCM must return to paying for other companies' retirees, the continued existence of OVCC and MCM would be in serious jeopardy, along with the mining jobs those companies represent.

The interests of the BCOA and small and medium-sized coal companies like OVCC and MCM that are bound through "me-too" agreements to NBCWAs negotiated by the BCOA and UMWA do not always coincide. *See, e.g.*, *KenAmerican Resources*, 99 F.3d at 1165 n.3 ("It is worth noting that the interests of members of the Association may well be quite different than the Ohio Valley companies."). Although amici anticipate that the BCOA and UMWA will vigorously defend the constitutionality of the Coal Act, the Court's decision in this case will have a direct impact beyond those immediate parties, and indeed will directly affect the viability of independent coal companies such as OVCC and MCM. Amici file this brief to ensure that the Court is aware of the nature of that impact, and its pertinence in analyzing the legal questions presented.

SUMMARY OF ARGUMENT

Petitioner Eastern Enterprises and its amici neglect to discuss how the Coal Act affected the many small and medium-sized independent coal mining companies that entered into "me-too" agreements with the UMWA. Before the Coal Act was enacted, these companies—which tend to have less capital at their disposal than BCOA members, or non-BCOA members large enough to negotiate separately with the UMWA—had great difficulty meeting the obligation to pay for retiree health benefits. The difficulty arose from the fact that such small companies were forced to pay millions of dollars annually for benefits for retired miners who had never worked for them, because the companies for whom these retirees had worked had left the field without providing for them. Striking down the Coal Act as unconstitutional would return independent coal mining companies to this untenable situation, precipitating a progressively deepening crisis in the industry as the renewed burden forces the closure of company after company.

Such an unpalatable result is by no means required, because insisting that the former employers of the retired miners fund their health benefits does not violate any provision of the Constitution. The decision about how to allocate economic burdens and benefits in resolving a public policy problem such as the crisis in retired miner health benefits is vested under our constitutional system in Congress, and at least since the demise of the *Lochner* era the judiciary has declined to second-guess such legislative policy judgments under the guise of the Due Process Clause. If any rational basis for the congressional decision can be imagined, the legislative determination will be upheld. Here one rational purpose of the Act is to broaden the funding base for retiree health benefits, thus preventing independent coal companies from bearing onerous liability for retired miners who never worked for them. This affords those companies a better opportunity to compete fairly in the industry today, helping promote a healthy and

viable coal industry and ensure more stable funding of benefits for present and future retirees.

Nor does the Coal Act effect a taking of property within the meaning of the Takings Clause. Prior to passage of the Coal Act, independent companies such as OVCC bore unreasonable and excessive liability for retiree health benefits, while many companies that had benefitted from the work of the retirees dumped the burden of paying for benefits for those retirees on others, while paying little or nothing themselves. Congress and the President saw fit to solve the resulting crisis by restructuring the economic benefits and burdens of those who were participating or had participated in the coal industry by passing the Coal Act. Such a reordering does not give rise to a taking. The former employers are not being unfairly singled out to bear a burden that should be borne by the public at large—the hallmark of a taking—but are simply being made to shoulder obligations which Congress could reasonably conclude were their responsibility in the first place.

ARGUMENT

I. STRIKING DOWN THE COAL ACT WOULD HAVE A PARTICULARLY DEVASTATING EFFECT ON INDEPENDENT COAL MINING COMPANIES SUCH AS OVCC AND MCM.

Coverage under the Coal Act extends to companies that are bound by one of the NBCWAs negotiated by the BCOA and the UMWA. The Act is not limited in its reach, however, to the large coal mining companies—Consolidation Coal Company, Peabody Coal Company, Eastern Associated Coal Company, Arch Minerals' Apogee Coal Company, and Zeigler Coal's Old Ben Coal Company—that are members of the BCOA. It also covers the many small and medium-sized companies bound to the terms of an NBCWA because they executed a "me-too" agreement with the UMWA, agreeing to be bound by the

pact entered into by the BCOA and the UMWA, even though these smaller companies did not participate in the negotiations.

Smaller employers enter into such "me-too" agreements for a variety of reasons. As one court has explained:

> [T]he basic purpose of a "me-too agreement" is to allow independent, usually smaller, employers to obtain all the benefits of the master collective bargaining agreement that is negotiated by the principal employers in the industry without having to participate in the industry negotiations, or to engage in separate negotiations, every few years. Thus, the independent employer is assured that (1) it will not be subject to a contract containing more onerous conditions than are applicable to its competitors, (2) it will obtain whatever protections or advantages the industry collective bargaining agreement provides other employers, (3) it will be saved the cost of expensive negotiations, and * * * (4) it will be covered by an agreement whenever the rest of the industry is covered and not subject to an agreement whenever the rest of the industry is not. [*Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund* v. *Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir. 1985).]

As detailed in the Statement of Interest of Amici Curiae with respect to OVCC and MCM, smaller companies bound to the NBCWA through a "me-too" agreement would incur dramatically higher costs for benefits for retirees who never worked for those companies if the Coal Act is struck down. Whatever the consequences for the large companies that are members of the BCOA, such increased costs could well affect the viability of many small and medium-sized "me-too" companies, which are particularly susceptible to cost pressures. That is especially true of those companies that—like OVCC and MCM—have entered into long-term coal sales agreements based on cost calculations that assumed the validity of the Coal Act.

The potentially devastating impact of requiring the smaller "me-too" companies to shoulder the burden of providing benefits for retirees who worked for other companies is a factor Congress was entitled to weigh in seeking a solution to the health care crisis affecting the entire industry. This is hardly an insignificant matter, since BCOA companies account for only one-half of the UMWA-mined coal in the United States.

II. THE COAL ACT DOES NOT VIOLATE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS.

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). The Court, however, has long since returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730.

For this reason, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted). Economic legislation, regardless of whether it is applied retroactively or prospectively, is accorded "strong deference," and need only be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Moreover, it does not matter whether the reason submitted in support of the statute actually motivated the legislature to enact it; "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *FCC* v. *Beach Communications,*

Inc., 508 U.S. 307, 315 (1993) (internal quotation marks and citations omitted).

The Coal Act is simply one example of Congress readjusting economic benefits and burdens to address a public policy problem—how to fund health benefits for retired miners, benefits Congress could conclude the miners reasonably believed they were entitled to receive. The issue is not the validity of that conclusion. As the Court has explained:

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. * * * [H]owever, those challenging [a] legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [*Vance* v. *Bradley*, 440 U.S. 93, 110-111 (1979).]

The issue, then, is simply whether there is a plausible reason for Congress to allocate the burdens of funding health benefits for retired miners in the manner it did. Prior to passage of the Coal Act, companies bound to the NBCWA and continuing to operate bore an increasingly crushing liability to fund such benefits, not only for their own miners but for miners who had worked for other companies which had left the field and failed to meet their obligations to those who had worked for them. One reasonable solution—the one adopted by Congress—was to broaden the funding base by requiring companies which had previously signed NBCWAs to pay health benefits for their former employees and, if necessary, a proportional amount for those retired miners who could not be traced to a specific viable company. *See Usery*, 428 U.S. at 18 ("[I]mposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor"); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989) ("It is surely

proper for Congress to legislate retrospectively to ensure that the costs of a program are borne by the entire class of persons that Congress rationally believes should bear them.").

While petitioner and its amici trumpet the alleged unfairness of imposing unforeseen obligations on them, Congress was free to decide that it was more unfair to impose retiree funding obligations on companies for whom the retirees had never worked. Congress was also free to weigh in the balance the consequences of imposing that burden on currently operating companies as opposed to companies that had left the industry, and to consider the importance of ensuring a healthy and viable coal industry to the Nation's economy. To the extent saddling operating companies like OVCC and MCM with responsibility for other companies' retirees would make it difficult or impossible for the operating companies to remain in business, Congress was free to conclude that it was more desirable to impose the responsibility on the companies for which the retirees actually had worked.

In any event, that debate—whether to impose the funding obligation on companies for which the retirees had worked or on currently operating coal companies for which they had never worked—is plainly one for the political process. Those advocating petitioner's view of what is fair and reasonable vigorously opposed the Coal Act, but their arguments failed to carry the day in the face of competing notions of fairness and justice. The political process remains open to those proponents, and in fact they recently sought to overturn the Act in Congress—where the issue should be resolved—but were again unsuccessful. *See* H.R. 1370, 104th Cong. (1995).

Petitioner and its supporters thus "lost a political battle in which [they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*id.*), and

"[t]he Constitution presumes that, absent some * * * antipathy [to the objecting parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted).

III. THE COAL ACT DOES NOT EFFECT A TAKING UNDER THE TAKINGS CLAUSE.

This Court has noted that

> [a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [*Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).]

The Coal Act is a classic example of the latter kind of program. By shifting most of the health benefit costs for retiree miners to companies for which they had worked, the Act solved a funding crisis that threatened to deny retired miners expected health benefits and to put the coal mining companies that had been bearing those costs—such as the amici—out of business. Congress was free to conclude that this "promote[d] the common good." *Id.*

In *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court rejected a challenge to the Multiemployer Pension Plan Amendments Act, noting that Congress "determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement" and that, "[f]or this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension funds." *Id.* at 227-228.

Similarly, in this case, Congress determined that companies such as petitioner had contributed to a funding

crisis by refusing to pay for the health benefits of thousands of their former employees and by forcing small independent coal companies such as the amici to shoulder this burden instead. Congress recognized that this situation could leave many retired miners without long-anticipated health benefits, and enacted a comprehensive statute to solve the problem, part of which requires companies such as petitioner to pay for health benefits for their former employees. This is simply "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, and, as in *Connolly*, does not rise to the level of a taking.

CONCLUSION

For the foregoing reasons, and those in the briefs for respondents, the judgment below should be affirmed.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
MATTHEW A. LAMBERTI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810
Counsel for Amici Curiae

* Counsel of Record

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OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

APFEL, COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF *AMICUS CURIAE* ON BEHALF OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF RESPONDENTS

HERVEY H. AITKEN, JR.
Counsel of Record
ROY A. SHEETZ
TAYLOR, THIEMANN & AITKEN, L.C.
908 King Street, Suite 300
Alexandria, Virginia 22314
(703) 836-9400
Attorneys for
Midwest Motor Express, Inc.

January 20, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* ON BEHALF OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest is interested in this case because the First Circuit correctly held that imposition of liability for retiree health benefit premiums

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[1] Counsel for all parties have consented to the filing of this *amicus* brief, and *amicus* has filed those consents with the Clerk of Court. Sup. Ct. R. 37.3. As required by Supreme Court Rule 37.6, *amicus curiae* Midwest Motor Express, Inc. states that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

pursuant to the provisions of the Coal Industry Retiree Health Benefit Act ("Coal Act") violates neither the constitutional guarantee of substantive due process nor the constitutional prohibition of uncompensated takings. Midwest has been assessed withdrawal liability pursuant to the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA") regarding an alleged withdrawal from the Central States Southeast and Southwest Areas Pension Fund ("Central States") which was wholly involuntary in character, in contrast with the facts of this case in which Eastern Enterprises incurred liability through voluntary actions on its part.

Midwest believes that this case does not fall within the ambit of Justice O'Connor's concerns expressed in her concurring opinions in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) ("*Connolly*") and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993) ("*Concrete Pipe*"), despite Petitioner's reliance on those opinions. By contrast, Midwest's case squarely raises the precise concerns identified by Justice O'Connor. Midwest is interested in the briefing and argument of this case to ensure that Petitioner's challenge to the Coal Act does not serve as a vehicle for disposing of the issues raised by Justice O'Connor's concurrences in an inapposite case.

Midwest was deemed to have withdrawn from the Central States Fund as a result of its employees' successful effort to have their collective bargaining agent, various local unions affiliated with the International Brotherhood of Teamsters, decertified pursuant to the provisions of the National Labor Relations Act. An arbitrator ruled that Midwest's withdrawal under these circumstances was involuntary, in that Midwest, as an employer was barred from taking any part in the decertification process and, in fact, abstained from any such involvement.

Petitioner has argued that inter alia, Justice O'Connor's concurrences provide a sound constitutional rationale for reversing the First Circuit's decision. Midwest disagrees, in that Petitioner's conduct in this case does provide a rational basis for the imputation of liability for continuing contributions on behalf of retired miners. In light of this, the instant case should not serve as a vehicle for a more general examination of the concerns expressed by Justice O'Connor in *Connolly* and *Concrete Pipe*.

SUMMARY OF ARGUMENT

In *Connolly*, Justice O'Connor expressed in a concurring opinion her view that a constitutional imposition of retroactive liability on an employer must rest on some basis in the employer's conduct that makes it rational for employees to expect that the employer is responsible for providing their benefits in the future. Petitioner's argument to the contrary notwithstanding, this case does not implicate Justice O'Connor's concerns. In her concurrence in *Connolly*, Justice O'Connor noted that the case implicating her concerns had not yet been before the Court. Likewise, in *Concrete Pipe*, Justice O'Connor's concurring opinion noted that her concerns with retroactive legislation expressed first in *Connolly* were once again not implicated. Midwest wishes to establish before this Court that, despite Petitioner's arguments to the contrary, this case does not fairly present the concerns articulated by Justice O'Connor, either. Accordingly, the Court should address the principles articulated in Justice O'Connor's concurrences narrowly, if at all.

ARGUMENT

In *Connolly v. PBGC*, 475 U.S. 211 (1986), the Court was presented with a challenge to the constitutionality of the MPPAA. The Court upheld the constitutionality of that statute, but Justice O'Connor, concurring separately, stated several concerns to which Petitioner herein directs

the Court's attention, despite the fact that the facts of this case do not create the concerns identified by Justice O'Connor. The crux of Justice O'Connor's concurrence in *Connolly* is that

> In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectation of benefits as the employer's responsibility.

Connolly, 475 U.S. at 229. Petitioner Eastern Enterprises argues that in this case there was no employer conduct of the sort identified by Justice O'Connor that would make the retirees look to Eastern Enterprises as a future source of insurance premiums to be made on their behalf. The First Circuit and the district court both found to the contrary in their decisions below. Under the Coal Act, signing of a collective bargaining agreement with the United Mine Workers of America ("UMWA") is sufficient conduct to bring an employer within its obligation to pay health insurance premiums for its former employees. Under Justice O'Connor's concurrences in both *Connolly* and *Concrete Pipe* signing a collective bargaining agreement is sufficient employer conduct to make imposition of the Coal Act's obligations on an employer constitutional.

By signing collective bargaining agreements, Eastern, and other employers became participants in the scheme which provided miners working under those contracts, and their families, with an increasingly comprehensive and wide-ranging system of health care during their active working lives and thereafter. Moreover, as noted in the First Circuit's opinion, the high degree of government involvement in the coal mining industry from the late 1940s onward, coupled with the implied promises of lifetime benefits contained in wage agreements made the obligations imposed on employers by the Coal Act a foreseeable risk of signing a wage agreement with the United Mine Workers. In signing the wage agreements, Eastern helped

to establish and perpetuate a benefit system upon which miners, former miners and their families relied for provision of health insurance. Eastern joined the system and, having joined, it is rational, in constitutional terms, for Congress, acting in the interests of former employees related to Eastern in some way to look to Eastern to help reform the system when it became unsupportable.

What distinguishes Eastern Enterprises and other coal industry employers burdened by the Coal Act from the as-yet unidentified employer about whom Justice O'Connor expressed her concerns in *Connolly* and *Concrete Pipe* is that the triggering mechanism for liability under the Coal Act is an *action* taken by the employer. Eastern would not be in the situation it now finds itself in had it not signed a wage agreement with the UMWA. Similarly, the employers in *Connolly* and *Concrete Pipe* would not have been assessed with withdrawal liability had they refrained from participation in a multiemployer pension plan or, having joined, not withdrawn from the plan.

Midwest, however, presents an entirely different factual and legal context. MPPAA imposes liability upon employers who withdraw from multiemployer pension plans. To the extent that an employer takes some action to withdraw from a pension plan, e.g. dissolving its business, this Court has found that imposition of withdrawal liability under MPPAA is constitutional. The definition of withdrawal contained in MPPAA is not restricted to withdrawals caused by an employer's actions, however. An employer is deemed to have withdrawn from a pension plan if it permanently ceases operations, 29 U.S.C. § 1383(a)(2), clearly the result of an action by the employer, or if it "ceases to have an obligation to contribute under the plan," 29 U.S.C. § 1383(a)(1), which event need not be the result of an action by the employer. It is one subset of the passive type of withdrawal, what Midwest has called an "involuntary withdrawal", that squarely presents the problems foreseen by Justice O'Connor in her concur-

rences in *Connolly* and *Concete Pipe*. It is possible for an employer covered by MPPAA to be assessed withdrawal liability based on the actions of other parties completely unrelated to the employer and contrary to the desires and best interests of the employer. Midwest is an example of precisely this type of withdrawal.

Midwest has been assessed for payment of withdrawal liability as a result of no action of its own but, rather, as a result of the actions of its employees acting without the cooperation of Midwest to decertify their union, an event which precipitated a finding that Midwest had withdrawn from the multiemployer pension plan to which it had been contributing on behalf of its employees. In 1991, Midwest began collective bargaining with the Teamsters local unions representing its employees with the object of getting a contract that would allow it to be more competitive. As part of its final collective bargaining offer, Midwest proposed that it would continue to participate in the multiemployer pension plan to which it had been contributing for many years on behalf of its employees. Midwest's employees, however, during a protracted strike determined that their interests would best be served by decertifying their union and doing without union representation. As required by the National Labor Relations Act, the employees took the steps necessary to achieve decertification without any assistance or encouragement from Midwest. In fact, had there been any participation by Midwest in the process, the National Labor Relations Board would not have allowed the decertification election to occur and if the assistance had been discovered after the election, the NLRB would not have allowed the decertification result to stand. Ultimately, the election occurred and the union was decertified. Within weeks of the certification of the election result by the NLRB, the multiemployer pension plan notified Midwest that Midwest had withdrawn from the plan and owed withdrawal liability on account of the employees' decertification. In sum, Midwest was assessed

withdrawal liability as a result of actions which it could not, and did not, initiate, promote, control or further in any way. Unlike the present case, Midwest's liability is based on behavior which is not its own, which it was forbidden by law from influencing.

Notwithstanding its protestations to the contrary, Eastern Enterprises has taken an action—signing a collective bargaining agreement with the UMWA—which is the basis for the liability it is contesting in this action. While the temporal remoteness of that action by Eastern Enterprises and other factors inherent in the Coal Act's statutory scheme may make the Coal Act unconstitutional as applied to certain employers, the Coal Act does not implicate the concerns raised by Justice O'Connor in her concurrences in *Connolly* and *Concrete Pipe*.

CONCLUSION

For the foregoing reasons, the Court should not apply the analysis proposed by Justice O'Connor in her concurrences in *Connolly* and *Concrete Pipe* to the facts in this case as that analysis is inapposite here. In the alternative, the Court should apply Justice O'Connor's narrowly, in light of the employer action taken by Eastern Enterprises upon which its liability under the Coal Act is based.

Respectfully submitted,

HERVEY H. AITKEN, JR.
Counsel of Record
ROY A. SHEETZ
TAYLOR, THIEMANN & AITKEN, L.C.
908 King Street, Suite 300
Alexandria, Virginia 22314
(703) 836-9400
Attorneys for
Midwest Motor Express, Inc.

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EASTERN ENTERPRISES,

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v.

KENNETH S. APFEL,
Commissioner of Social Security, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, CENTRAL COAL COMPANY, CENTRAL OHIO COAL COMPANY, PRICE RIVER COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR COAL COMPANY IN SUPPORT OF RESPONDENTS

DAVID M. COHEN
Counsel of Record
ANTHONY J. SWANECK

American Electric Power Company
1 Riverside Plaza
Columbus, Ohio 43215
(614) 687-3042 / Fax: (614) 687-3175

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

Amici curiae Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Coal Company [collectively referred to as "AEP Coal Companies"] submit this brief in support of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722 (1992), and the Coal Act's method of assigning coal industry beneficiaries to coal operators. The AEP Coal Companies believe that the Coal Act lies within the bounds of constitutional authority granted to Congress under the Commerce Clause because it: rationally regulates national economic policy by bringing stability to the coal industry, rationally recognizes that the conduct of companies such as Petitioner creates in coal industry employees a reasonable expectation of continuing health care benefits, and rationally assigns beneficiaries to responsible companies based primarily on their employment relationships within the coal industry.

Inasmuch as these factors are consistent with factors favoring constitutionality found in the Court's analysis of similar legislation in both *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court should defer to the judgment of Congress and the executive branch, and hold that the method of assigning beneficiaries to coal industry companies under the

Coal Act violates neither the Due Process Clause nor the Takings Clause of the Fifth Amendment[1].

STATEMENT OF INTEREST OF AMICI CURIAE

Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Coal Company [collectively referred to as "AEP Coal Companies"] are subsidiary corporations wholly owned by utility operating companies, in turn, owned by American Electric Power Company a public utility holding company established pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6. The AEP Coal Companies executed either the 1974 and 1978 National Bituminous Coal Wage Agreements and/or they executed Coal Wage Agreements subsequent to the 1978 Agreement. These coal companies have paid nearly $5 million in health benefit premiums for retired miners since the passage of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). 26 U.S.C. §§ 9701-9722 (1992). Additionally, the AEP Coal Companies anticipate paying over $6 million in future health benefit premiums for retired miners who were employed by now inactive AEP

[1] Each party has consented to the filing of this brief. Their written consent is included with this brief. Sup. Ct. Rule 37.3(a).

No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. This brief was not authored in whole or in part by counsel for a party. Sup. Ct. R. 37.6.

Coal Companies. The Court's determination of the constitutionality of the Coal Act can directly impact the AEP Coal Companies' reasonable expectations of their obligations under the Coal Wage Agreements and the Coal Act, affect the price of coal in the future and consequently affect the customers of AEP, as well as the customers of other electric companies which use coal as a fuel.

ARGUMENT

I. THE COAL ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY THAT CONTINUES AN EFFORT TO PROTECT EMPLOYEE RETIREMENT BENEFITS.

In 1992 Congress concluded an investigation into the state of the private health care benefits program in the coal industry and found that:

> [I]n order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities*[2] in order to secure plan funding and allow for the provision of health care benefits to such retirees.

Pub L. No. 102-486 § 19142(a)(2) (emphasis added).

[2] While not central to amici AEP Coal Companies' argument, Petitioner claims that the emphasized language shows Congress intended to identify those parties most responsible for the failure of the private benefit plan. *Brief of Petitioner at 27.* Petitioner offers no support for this interpretation, and such an interpretation conflicts with the plain language of the congressional findings.

In response to these findings, Congress, acting pursuant to the constitutional authority granted to it under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722 (1992). The Coal Act was but the next logical step in a series of legislative efforts to stabilize and protect employee benefits. Most notably, in 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). 29 U.S.C. §§ 1381-1405 (1980). The MPPAA, just as the Coal Act is today, was challenged on both Fifth Amendment Due Process and Takings Clause grounds. The Court addressed the Due Process Clause challenge in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and the Takings Clause challenge in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In both instances the Court upheld the constitutionality of the MPPAA. Today the Court is asked to again cover much of the same ground with respect to the constitutionality of the Coal Act.

II. PETITIONER'S CONDUCT CREATED THE EXPECTATION THAT BENEFITS WOULD NOT BE TERMINATED AND JUSTIFIES PETITIONER'S LIABILITY FOR THE HEALTH CARE COSTS AT ISSUE.

Petitioner and its wholly owned subsidiary, Eastern Associated Coal Company, acted in such a way as to create the expectation that health care benefits would not be terminated. Petitioner signed the 1950 National Bituminous Coal Wage Agreement establishing health care benefits for coal industry employees. Petitioner signed

later Coal Wage Agreements that continued those benefits. Eastern Associated signed the 1974 and 1978 Coal Wage Agreements that formally made health care benefits permanent. Petitioner's actions, taken together with Eastern Associated's conduct, served to create the expectation that health care benefits would not be terminated.

A. Petitioner's Reliance On The Concurring Opinion In *Connolly* Is Misplaced.

Although the Court, in a unanimous decision, upheld the constitutionality of the MPPAA against a Takings Clause challenge in *Connolly*, Justice O'Connor, in discussing the MPPAA's imposition of liability on contributing employers for unfunded benefits that accrued in the past, counseled:

> Our recent cases leave open the possibility that the imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat employees' expectations of benefits under the plan as the employer's responsibility.

Connolly, 475 U.S. at 229 (O'Connor, J., concurring).

While it remains to be determined whether benefits legislation is arbitrary and irrational absent a nexus between employer conduct and employee expectations, amici curiae AEP Coal Companies write to address the issue of employer conduct and employee expectations considered by Justice O'Connor, in *Connolly*, and to show that Petitioner's past conduct provoked the rational

expectation in former employees that they would receive the benefits now guaranteed by the Coal Act.

B. Petitioner's Conduct Created A Reasonable Expectation That Benefits Would Continue.

It should come as no surprise to Petitioner that the Coal Act holds Petitioner accountable to fund certain retirement benefits. One need only review Petitioner's conduct to see that the expectations of its employees that health benefits would not be terminated relates rationally to Petitioner's business conduct over a period of almost forty years.

Petitioner was an early participant in the plan to establish health benefits for miners. Petitioner signed the 1950 Coal Wage Agreement and signed later agreements up until the time in 1966 when it transferred its coal industry operations to its wholly owned subsidiary Eastern Associated. *Eastern Enterprises v. Chater*, 110 F.3d 150, 154 (1st Cir. 1997). The 1950 Agreement, in return for concessions related to mechanization, created a welfare and retirement fund for mine employees. *Id.* at 153. Between 1950 and 1974 subsequent Coal Wage Agreements were signed. None of those agreements modified the basic structure of the 1950 plan. *Id.* The 1974 Coal Wage Agreement guaranteed lifetime health benefits to enrolled miners. The 1978 Coal Wage Agreement extended the guarantee of lifetime health benefits to those "orphaned" miners whose employers had abandoned the coal industry. *Id.*

Until selling Eastern Associated to Peabody Holding Company in 1987, Petitioner was Eastern Associated's

parent and sole stockholder. Petitioner received dividends totaling more than $100 million from Eastern Associated. *Brief for Petitioner at 6, note 13.* From 1966 through 1987 Eastern Associated was a signatory to the Coal Wage Agreements, including the 1974 and the 1978 Agreements. *Brief for Petitioner at 7.* Petitioner's holding of Eastern Associated's stock, its receipt of dividends derived from Eastern Associated's mining operations, and the similarity in name of both organizations inextricably link Petitioner with Eastern Associated. *See generally, Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic and Commerce Ass'n*, 247 U.S. 490 (1918) (discussing conduct leading to conclusion that subsidiary corporation was an agent of its parent); *18 Am. Jur. 2d, Corporations § 59 (1985)* (factors tending to show control of subsidiary by parent). As a wholly owned subsidiary, Eastern Associated was controlled by Petitioner. Moreover, Petitioner accepted the benefits of its arrangement with Eastern Associated for nearly twenty years. This lengthy, linked relationship belies Petitioner's efforts now to interpose Eastern Associated as a shield of constitutional significance, particularly when considered with the reality of reasonable coal miner expectations.

C. Miners' Expectation Of Continuing Benefits Was Reasonable In Light Of Petitioner's Conduct.

The miners' expectations of lifetime benefits can be traced to Petitioner's conduct as a participant in the Coal Wage Agreements. The 1950 Coal Wage Agreement created the welfare and retirement plan that the miners

worked under until the plan was modified in 1974. *Eastern*, 110 F.3d at 153. During this period, although the contract language expressed that benefits were subject to termination at any time, *Brief for Petitioner at 5*, the structure of the plan remained unchanged. As a result, while there may have been textual support for an argument that the benefit plan could be terminated, there was little, if any, threat that termination would occur. Instead, the plan continued basically unchanged for more than a generation.

As the years passed with the benefit plan being continued in each subsequent Coal Wage Agreement, it is reasonable to expect that the miners came to view the benefit plan as certainty rather than the mere illusion Petitioner would have the Court accept. Petitioner chose to participate in the Coal Wage Agreements and enjoyed their benefits, including labor harmony, and as such, worked to create the belief in the minds of the miners that the retirement benefits would continue. While Petitioner now attempts to hide behind the formalities it imputes to the contract language, that language binds neither the Court nor Congress. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). The Court certainly is free to, and should, look beyond the mere language parroted in successive Coal Wage Agreements to the course of dealing between the parties. With this view, it becomes clear that there was no real threat that the benefit plan would be terminated, and that the expectation of the miners that health benefits would not be terminated was reasonable.

D. The 1974 National Bituminous Coal Wage Agreement Merely Formalized What Was Already A Reality, While The 1978 Coal Wage Agreement Took The Next Logical Step.

While Petitioner points to the 1974 and 1978 Coal Wage Agreements as being key to establishing liability for funding the health care plan, *Brief of Petitioner at 30*, in reality those agreements did little to change what was already in place and being relied upon. The 1974 Coal Wage Agreement granted lifetime benefits to all enrolled miners. *Eastern*, 110 F.3d at 153. In effect it eliminated the language found in previous Coal Wage Agreements regarding termination of benefits. While on the surface this appears to be a significant change, in actuality it only formalized that which was already established informally. The benefit plan of the 1950 Coal Wage Agreement had remained unchanged since its inception. *Id.* Benefits were renewed with each Agreement. The nearly twenty-five years of ongoing conduct, by both employers and employees, reasonably compels the conclusion that both parties accepted this arrangement as a permanent part of the Coal Wage Agreement. By agreeing to the 1974 revision, the miners received formal recognition of what they had come to expect informally; namely, that the benefit plan would continue. The coal operators gave up little in return since they only formalized a plan that was already in place. Therefore, the only true change in the benefit plan resulting from the 1974 Coal Wage Agreement was to commit reality to writing.

The 1978 Coal Wage Agreement went a step beyond the 1974 revision, but it was a step that was within the reasonable expectations of both parties. With the 1974

Agreement guaranteeing lifetime benefits to all enrolled miners, the time was ripe to extend the same guarantee to those miners who had retired from the industry earlier. A primary goal of labor negotiations is to improve conditions for those represented. Therefore, it is unreasonable to believe that in 1978 the industry and the miners would not have expected to move forward when it came to the subject of health care benefits.

By tracing the evolution of the health care benefit plans from the 1950 Coal Wage Agreement to the present it is apparent that the conduct of Petitioner, and companies similarly situated, resulted in the expectations in the minds of the miners that health care benefits would not terminate. The 1974 and 1978 Coal Wage Agreements merely formalized the course of dealing that had developed between the parties. Petitioner benefited from the 1974 and 1978 Agreements through its interlocking relationship with Eastern Associated, its wholly owned subsidiary and a signatory to the 1974 and 1978 Agreements. The Court should not allow Petitioner to avoid the responsibilities associated with the benefits it received by hiding behind the obsolete language of past agreements and attempting to pass on to the retired miners, the other coal operators such as the AEP Coal Companies, or the public at large the responsibility of funding critical health care benefits.

III. THE METHOD OF ASSIGNING BENEFICIARIES UNDER THE COAL ACT IS RATIONAL AND NONARBITRARY; THEREFORE, THE COURT SHOULD DEFER TO THE JUDGMENT OF CONGRESS.

Legislation affecting national economic policy is subject to a rational basis standard of review. If Congress acted in a rational way to achieve a legitimate legislative purpose, then the Court should defer to the judgment of the legislative and executive branches. *Gray*, 467 U.S. at 729. Ensuring health care benefits for coal industry retirees is a legitimate legislative purpose, and Congress has achieved that purpose through a rational determination that companies which profited from the labor of the retirees, rather than the other coal operators or the public at large, should bear the burden of this cost.

A. The Coal Act Assigns Beneficiaries In A Rational And Nonarbitrary Manner Based On The Employment Relationship Between The Beneficiary And The Coal Operator, Taking Into Consideration The Operator's Status As A 1978 National Bituminous Coal Wage Agreement Signatory.

The method developed by Congress to assign beneficiaries under the Coal Act is rational and nonarbitrary. Congress based the method of assignment on two factors. First, Congress considered the relationship between the coal operator and the beneficiary. Next, Congress looked to the coal operator's status as a signatory to the 1978 or later Coal Wage Agreements. The result of this two step approach is that whenever possible a beneficiary is

assigned to a coal operator for whom he or she worked. Then, if a beneficiary worked for both a 1978 (or later) signatory and for a non-1978 signatory, the 1978 signatory bears the burden of funding the benefits. 26 U.S.C. § 9706 (1992). Finally, Congress acted to ensure benefits to those "orphaned" miners who, through no fault of their own, worked for an employer who abandoned the business. For those miners, Congress established a general benefit fund to which all current or former coal operators still in business contribute. 26 U.S.C. § 9704 (1992).

B. Regulations Affecting National Economic Policy Come To The Court With A Presumption Of Constitutionality And Congress Is Under No Obligation To Select A Method Of Regulation More To The Liking Of Petitioner.

In *Gray*, the Court recognized that,

> [i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Gray, 467 U.S. at 729.

Therefore, as long as the Coal Act's method of assigning beneficiaries is both rational and nonarbitrary, Congress is under no obligation to choose a method more to Petitioner's liking. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 478 (1985) ("[W]e disagree with the Court of Appeals' conclusion that the Due Process Clause limited Congress' power

to choose a different reimbursement scheme in this case."). Congress chose to place the responsibility of funding retiree benefits on the coal operators that profited from the miners' labor, instead of placing the burden on other coal operators or the public at large. While Petitioner may not agree with that decision, Petitioner has failed to show that Congress acted in an irrational or arbitrary manner in selecting that method of funding.

C. The Retroactive Aspect Of The Coal Act Does Not Defeat The Presumption Of Constitutionality.

The beneficiary assignment provisions of the Coal Act are not unconstitutional merely because they act retroactively when applied to coal operators such as Petitioner for,

> [p]rovided that the retroactive application . . . is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Gray, 467 U.S. at 729.

While the Court stated in *Gray* that "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation . . . meets the test of due process", *Id.* at 730 (quoting *Turner Elkhorn Mining*, 428 U.S. at 16-17), the Court held that this "burden is met simply by showing that the retrospective application of legislation is itself justified by a rational legislative purpose." *Id.*

The Coal Act operates to guarantee that retirement benefits promised to coal miners are paid and seeks to do so in a rational manner that places the burden of funding those benefits, not on the public at large, but on those companies that benefited from the miners' labor and that created the expectation that benefits would not be terminated. That the Coal Act does so retroactively does not violate accepted Due Process principles because, to the extent possible, benefit responsibility to a miner follows the path of previous economic benefit received by – or through – that miner's former employer.

D. The Court Should Defer To The Collective Judgment Of Congress And The Executive Branch.

Legislation affecting national economic policy is due "strong deference" by the Court when Congress acts in a rational and nonarbitrary manner. *Gray*, 467 U.S. at 729. The method of assigning beneficiaries under the Coal Act is rational. Beneficiaries are assigned under the Coal Act based on their employment history tempered by whether the employer was a 1978 (or later) Coal Wage Agreement signatory. While Petitioner may not agree with this method, Petitioner failed to make a case for irrationality and arbitrariness in the courts below and has failed to persuasively suggest any reason the Court should not confirm the Coal Act as a proper exercise of the collective judgment of Congress and the executive branch.

CONCLUSION

The method of assigning beneficiaries under the Coal Act to companies that profited from association with the coal industry is a rational, nonarbitrary, and valid exercise of congressional power that is related to the expectations the beneficiaries developed through the conduct of their former employers. Since the actions of Congress were rational and nonarbitrary, the Court should defer to the judgment of the legislative and executive branches of Government and hold that the Coal Act does not violate the Due Process Clause or the Takings Clause of the Fifth Amendment, and should affirm the judgment of the Court of Appeals.

Respectfully submitted,

DAVID M. COHEN, *Counsel of Record*
ANTHONY J. SWANECK

American Electric Power Company
1 Riverside Plaza
Columbus, Ohio 43215

Attorneys for Amici Curiae, Cedar Coal Company, Central Appalachian Coal Company, Central Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Coal Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Eastern Enterprises,

Petitioner,

v.

Kenneth S. Appel, Commissioner of Social Security, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief *Amicus Curiae* of Freeman United Coal Mining Company in Support of Respondents

KATHRYN S. MATKOV
Counsel of Record
JOHN A. WASHBURN
BRIAN B. GILBERT
GOULD & RATNER
222 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 236-2003

Counsel for Amicus Curiae

January 20, 1998

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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STATEMENT OF INTEREST[1]

The *amicus*, Freeman United Coal Mining Company ("Freeman"), and its predecessors have been mining coal in Illinois since 1872. Freeman, which is a subsidiary of General Dynamics Corporation, currently operates two deep mines and one surface mine in the Central Illinois basin, and produces approximately 4.5 million tons of coal annually. The Company employs approximately 500 people in the State of Illinois. Although Freeman is not presently a member of the Bituminous Coal Operators Association ("BCOA") or a signatory to the new 1998 National Bituminous Coal Wage Agreement ("NBCWA") with other BCOA members, Freeman and its predecessors were until recently members of the BCOA and were signatories to all previous NBCWA's executed through and including the 1993 NBCWA.

Prior to the implementation of *The Coal Industry Retiree Health Benefit Act of 1992*, 26 U.S.C.A. § 9701-22 (West Supp. 1997) (the "Coal Act"), Freeman contributed to the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust and the predecessor UMWA Welfare and Retirement Fund of 1950 ("Prior Funds").

Freeman experienced adverse economic conditions in the late 1980's and early 1990's as a result of a change

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[1] Counsel for all parties have consented to the filing of this amicus brief, and *amicus* has filed those consents with the Clerk of this Court in accordance with Rule 37.3. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6. The brief was not authored in whole or in any part by counsel for a party. Rule 37.6.

in the demand for Illinois basin coal and the soaring costs of required contributions to the Prior Funds. These soaring costs were a direct result of severe inflation in health costs and the shrinking universe of companies in the coal industry available to fund these costs. The Coal Act was a direct response to this dilemma faced by Freeman and other similarly situated companies to insure that bargained-for benefits guaranteed to the beneficiaries of the Prior Funds would be paid despite insufficient contributions.

The *amicus* agrees with Respondents that the Coal Act (a) is a rational exercise of Congress' legitimate authority and thus withstands scrutiny under the Due Process Clause, and (b) does not constitute a taking of property under the Just Compensation Clause.

STATEMENT OF FACTS

Freeman was created by the merger of Freeman Coal Company and United Electric Coal Companies in 1975. At the height of its operations in 1982, Freeman operated eight (8) coal mines and produced coal at a rate of nearly eight million tons per year. As a signatory to previous NBCWAs, Freeman made contributions to the Prior Funds from their inception. Prior to the Coal Act, Freeman's contributions to the Prior Funds were based upon an assigned hourly rate multiplied by the number of man hours worked by UMWA miners for the applicable period and/or a contribution rate per ton of coal produced. Between January of 1988 and January of 1993 when the Coal Act was implemented, Freeman's hourly contribution rate increased from $1.91 to $3.67. This constituted a staggering increase of in excess of 92% during

this five (5) year period. As the Coal Commission found, this increase was the direct result of soaring health costs and fewer responsible operators in the coal industry available to fund these costs. Before the adoption of the Coal Act, Freeman was also required to pay benefits costs for individuals that were never employed by Freeman.

This increase in contribution rates occurred during a time when Freeman was experiencing financial pressures due to the fact that markets for Illinois basin coal were shrinking as a result of Clean Air Act legislation and increasing competition from Western coal sources.

Under the Coal Act, Freeman is currently assigned 796 beneficiaries covered by the UMWA Combined Fund ("Combined Fund"). Freeman's contributions in the current year will total $1,791,289.68, which will constitute approximately a 50% decrease from the contributions Freeman was making to the Prior Funds prior to the Coal Act. Although health costs continue to soar, the beneficiaries assigned to Freeman all constitute former employees of Freeman and their dependents. At present, Freeman is paying for its own employees and former employees, not for those of other companies, like Eastern, whom by their own volition have chosen to no longer operate in the coal industry.

An increase in Freeman's required fund contributions to the pre-Coal Act levels, in the face of the difficulty of surviving any extended strike and shutdown at this time similar to that experienced by The Pittston Company in 1992 over issues related to benefits contributions, could threaten the future viability of the company.

ARGUMENT

A.

THE COAL ACT WITHSTANDS SCRUTINY UNDER THE DUE PROCESS CLAUSE BECAUSE IT RATIONALLY ALLOCATES THE FINANCIAL BURDENS OF FUNDING UMWA BENEFITS AMONG THOSE PARTIES WHO MOST LOGICALLY SHOULD BEAR SUCH COSTS—THE FORMER EMPLOYERS WHO PARTICIPATED IN THE CREATION OF THE COAL INDUSTRY'S MULTI-EMPLOYER RETIREE BENEFITS SYSTEM

To succeed on its claim, Petitioner must establish that Congress "acted in an arbitrary and irrational" manner *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) in enacting the Coal Act. If the Coal Act:

> "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

Even where a statute is applied retroactively or has retroactive effects, such legislation should be upheld if "the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

1. Pre-Coal Act History of Coal Industry Provided Rationale for Adoption of Coal Act

A review of the history of the coal industry over the period of time from the 1940's to the passage of the Coal Act does show that Congress was neither arbitrary nor irrational in enacting this legislation. Petitioner and certain of its amici would like this Court to forget this history and conclude that each NBCWA was negotiated

in a vacuum for a finite period of years without any view toward the future or any expectation of ongoing responsibility on behalf of coal operators. This view of the industry is jaundiced and inaccurate.

As the Coal Commission found, the provision of health and welfare benefits to miners has been a critical issue for labor and management since the 1940's. *Coal Commission Report: A Report to the Secretary of Labor and the American People* (Nov. 1990) at 29. With the shutdown of the coal industry in the 1940's, the UMWA made it clear that its members would no longer report to work without the provision of health and welfare benefits to miners and their dependents. Although, as Petitioner points out in its brief, the NBCWA's contained provisions regarding the revocation, termination or amendment to benefits, *Brief for Petitioner* at 5, *amicus* believes that it was clear to every company operating in the industry that subsequent NBCWAs or other agreements with the UMWA would inevitably provide for retiree medical benefits, in some form or another, for miners and their dependents. For Petitioner to claim that it exited the coal industry in 1965 without any inkling that such benefits would remain a part of the NBCWA package is simply disingenuous.

It must be remembered that the UMWA Welfare and Retirement Fund of 1946 ("1946 W&R Fund") instituted the first union health and welfare fund. The Krug-Lewis Agreement which created the 1946 W&R Fund was reached only after a protracted and bitter strike in which control of the mines was assumed by the Federal government. Succeeding NBCWAs modified and furthered the concept of a funded health and welfare fund. Although each preceding NBCWA had contained provision for the

funding of these benefits, the 1978 NBCWA finally codified what the industry had been pointing towards for many years—an assurance of health care to "orphaned" miners (retired miners whose last employer was no longer in business or otherwise ceased contributing to the funds) and an obligation of signatories to maintain benefits and to continue to contribute so long as the operator remained in business (the so called "evergreen clause"). In fact, the Coal Commission found that guaranteed health care benefits for miners had, many years previous to the 1978 NBCWA, already become a well entrenched expectation of miners and their dependents. *Coal Commission Report* at 1.

The crisis that lead to the adoption of the Coal Act was caused by a multitude of factors, the most significant being the increasing cost of health care coupled with the continuing contraction of the coal industry. *Coal Commission Report* at 2. Given the number of miners and dependents receiving benefits under the Prior Funds, the increasing cost to provide such benefits and the shrinking base of companies available to fund such costs, it became clear that something needed to be done. The Pittston strike in 1992 brought these issues to a head and Congress stepped in to investigate the crisis and develop a solution.

2. The Coal Act Is a Rational Response to the Problems Faced by the Coal Industry, Combined Fund and Prior Fund Beneficiaries

Congress was faced with the prospect of either (a) doing nothing, which would have increased the chaos in the coal industry, led to more strikes, left in excess of

100,000 individuals without health coverage and potentially crippled the coal industry, or (b) devising a plan to fund these benefits through the natural life cycle of the Prior Funds. Congress investigated several mechanism's including an industry wide assessment or the "pay for your own" plan that it eventually adopted. *Coal Commission Report* at 61-69.

By assigning fund beneficiaries to current and former NBCWA signatories who employed such beneficiaries, Congress selected a scheme that was fair and equitable. Responsibility for the payment of benefits would at least fall on companies that had a clear nexus with the covered individuals and profited from the employment of such individuals while they were members of the work force. In addition, by creating a tiered approach for the assignment of beneficiaries, Congress insured not only that plan beneficiaries would be assigned to the company that had the strongest nexus with such beneficiary, but also that the number of unassigned beneficiaries would be kept to a minimum. This would reduce the burden placed on existing coal operators to fund the costs of these unassigned beneficiaries, which was one of the primary causes of the crisis in the first place. The resulting framework is certainly more rational than the Petitioner's "solution" which, if accepted, would increase the number of "orphaned" miners and shift the cost of paying health benefits for such miners and their dependents to companies, like Freeman, that never employed, and had no connection whatsoever with, such miners.

Perhaps, a better scheme could have been developed by Congress, although it is difficult to imagine what such a system might look like. Nevertheless, to withstand Due Process scrutiny, Congressional solutions need only be

rational and not arbitrary. *Turner Elkhorn,* 428 U.S. at 19. Clearly, given the historical background and the problems identified to be resolved, the Coal Act is a rational response.

B.

THE IMPOSITION OF LIABILITY UNDER THE COAL ACT ON PETITIONER IS NOT A "TAKING" UNDER THE JUST COMPENSATION CLAUSE

Three factors are of particular significance in determining the existence of a Fifth Amendment "taking": (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulatory action interferes with reasonable investment-backed expectations; and (3) the character of the government action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

With respect to economic impact, the appropriate "yardstick of economic impact is proportionality." *In Re Chateaugay Corp.*, .53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995). As discussed above, the framework adopted by the Coal Act is a perfectly proportional scheme. Stated simply, each coal operator or former coal operator that were signatories to NBCWAs are required to pay for their own former employees and their dependents. Beneficiaries that are unassigned are paid for proportionately by all contributors to the fund. This places liability for funding exactly where it should be, on those companies that employed the fund beneficiaries and who participated as employers in the creation of the multi-employer benefit system. In contrast, the pre-Coal Act scheme was grossly disproportionate in that it placed liability for all beneficiaries on the few remaining companies in the coal industry, even though they had no nexus with these beneficiaries.

Petitioner argues that proportionality is not served since Petitioner did not "contribute to the financial problems of the Benefit Plans" or promise lifetime health benefits to miners. *Petitioner Brief* at 42. Petitioner conveniently divorces itself from this class of companies, ignoring the fact that the crisis in the funds is not something that developed over night but had its roots back in the days when Petitioner and others participated as contributor in the creation of the multi-employer benefits system. See *Coal Commission Report* at 29. Funding has always been an issue for health and welfare benefits since the 1940's. As stated earlier, at the time Eastern and other operators left the BCOA, it was only reasonable to expect that the continuation of these benefits for miners in the future would be a linchpin of any management/labor compact. The main cause of the ensuing financial crisis was increasing health care costs coupled with fewer companies available in the coal industry to bear these costs. *Coal Commission Report* at 2. These developments did not arise as a result of any act of Freeman or the BCOA. Petitioner wants to retain all of the benefits from coal operations and earlier NBWCA's (such as the receipt of significant dividends from EACC over the years), but does not want to bear any corresponding responsibility. Thus, Petitioner's position favors disproportionality and is consequently inequitable.

Certain of Petitioner's *amici* argue that the Coal Act is a "taking" because certain of the former operators affected by the Coal Act cannot afford to make the payments required thereby. See *Brief Amici Curiae of Unity*

Real Estate Company, et al. Yet, as long as the Coal Act's application is proportionate, as is demonstrably the case, it should withstand scrutiny under the "takings" clause. Similar requirements of funding or cost sharing under the Multiemployer Pension Plan Amendments Act and the Comprehensive Environmental Response, Compensation Liability Act of 1980 have not rendered such statutes unconstitutional. See *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993); and *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.), cert. denied, 108 S. Ct. 146 (1986) at 734.

With respect to the second prong of the "takings" analysis, Petitioner argues that there was no way to foresee the Coal Act, the guarantee of lifetime benefits or the imposition of liability on former employees. As discussed above, however, Petitioner simply ignores history including the importance of the coal industry to the national economy, the fact that miners clearly would not stand for operators not providing these benefits (as evidenced by the 1940's shutdown and the negotiation of each NBCWA since), and the Federal government's willingness to get involved to insure health care benefits for retired miners. *In Re Chateaugay Corp.*, 53 F.2d at 495-496; *In Re Blue Diamond Coal Co.*, 79 F.3d 516 at 525-526 (6th Cir.), cert. denied, 117 S. Ct. 682 (1996).

Finally, the Coal Act was enacted by Congress in response to labor disputes in the coal industry to avoid disruption of interstate commerce and to insure that a significant group of individuals, who had reason to expect a different result, are not left without privately

funded health care benefits (which, if this occurred, would certainly increase the burden on the government and the rest of the country to fund these costs). The Coal Act is intended to promote the common good by "adjusting the benefits and burdens of economic life" and is therefore not the type of governmental action that would be deemed a "taking" of property. *In Re Chateaugay Corp.*, 53 F.2d at 496, *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996).

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

KATHRYN S. MATKOV
Counsel of Record
JOHN A. WASHBURN
BRIAN B. GILBERT
GOULD & RATNER
222 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 236-2003

Counsel for Amicus Curiae

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